Supreme Court, U.S.
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92-1560

No. _____

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether, in an action by employees under §301(a) of the Labor Management Relations Act, subsequent to a jury's Special Verdict and a Judgment on liability having been entered concluding that the Defendant successor employer had assumed and breached the collective bargaining agreement in laying off the employees and that the Defendant Union had breached its duty to fairly represent the employees:

1. May the Defendants defend the damage and remedy claims of the employees by asserting that they could have negotiated, but did not, a modification to the provisions of the collective bargaining agreement which the successor employer had breached and, if so, do the employees have the burden to prove that such a hypothetical modification would not have been ratified by the appropriate union membership?

2. Are attorney fees an element of the compensatory damage claims of employees in a §301 action or, alternatively, are attorney fees only awardable under the traditional American rule and, if so, the nature of "bad faith" required?

3. Where the Court, rather than a jury, assesses the damages due an employee in a §301 action, is interest properly awardable from the date of loss in order to make the improperly discharged employee "whole" and, if so, what is the basis for any such award?

PARTIES TO PROCEEDINGS BELOW

Parties to the proceedings below, not listed in the caption, consist of the following individual Petitioners and Respondents:

Petitioners:

Selman (Joe) Thomas, Jr., Lloyd Anderson, David Bell, Dale John Burk, Dennis Canterbury, John Conner, Curtis Cotton, Michael DeJaynes, Ressie Estell, Mary L. Fillbach, Personal Representative of the Estate of Robert Fillbach, Paul Flower, David Foster, Donald Froien, LaCinda George, Personal Representative of the Estate of James George, Eddie Gill, Ivan Heesacker, Robert Hinsley, Shirley Huston, Personal Representative of the Estate of Lewis Huston, Josephine James, Calvin Jewett, Ralph Johnson, Kent Jorgensen, Patricia Livengood, Clyde Moore, Percy Moore, James Nash, Robert Peters, John Pittman, Sylvio Rebolloso, Jane Reed, Wayne Shaffar, Paul Stone, Rose E. Mascarello, Personal Representative of the Estate of James Thompson, James Walker, Clayton Welch, Ishanwee Wrenn, Gerald Carew, Thomas Hayden, Melvin Wade, Jr., William Marsh.

Respondents:

Curtis Burton, Clark Cowing, Tom B. Miller, Donita Wimer, Bernard Von Tersch, Audrey Leahy, Joan Delesene, Mary L. Ardery, Junior Lee Hoxsie, Annie C. Moore, Bob Herman, Gary Wasinger, Barbara Wasinger, Mark Boro, Bessie Sherrod, Richard Timperley, Thomas J. Mathis, William T. Adams, J. Patrick Laughlin, Matthew

PARTIES TO PROCEEDINGS BELOW – Continued

L. Seeman, Mark Martinez, Jim Hudson, John P. Gue, Larry Stryker, Kirk Keller, Steve Keithley, Jack Hotz, Jr., Margaret Hilliard, Carlotta Chapman, Gary Kjar, Jan Hall, David Kunkle, Ronald Black, Homer C. Jackson, Rondell Guffey, Joy Southall, Janelle Swafford, Delores Urkevich, William H. Bailey, Brenda J. Brown, Emma J. Martin, Dave Hawkins, Dana McCoy, Donnie Parks, Bernie H. Bell, Edmon J. Flury, Kathryn Nelson, Carolyn L. Dibelka, William J. Miller, Taral E. Clift, L. Z. Steen, Douglas O'Leary, Rodger Vorderstrasse, Robert Heib, Tim Schneckloth, Alvin Ward, Richard Lindaer, Harold Poppino, Mary Wright, Doug Woodworth, Richard Wills, R. P. Moore, Fred Sherrill, Riley A. Gunter, Richard Carter, Bob Wyskowski, Lorrie Griffis, Barb Griffin, Richard Farris, Donna Adams.

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REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

1. *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company,* (Eighth Circuit Opinion dated December 31, 1992). (App. 1)
2. Memorandum Opinion of the District Court (unreported) October 11, 1991 *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company.* (App. 11)
3. Order and Judgment of the District Court (unreported) October 11, 1991 *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company.* (App. 31)
4. Order and Judgment of the District Court (unreported) February 24, 1992 *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company.* (App. 34)
5. *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company,* 826 F.2d 735 (8th Cir. 1987), *Cert. denied,* 484 U.S. 1062, 108 S.Ct. 1019, 98 L.Ed.2d 984 (1988). (App. 37)
6. Order of the District Court (unreported) August 13, 1986 *Selman (Joe) Thomas, Jr., et al., v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company.* (App. 63)
7. Arbitrator's Decision and Award, June 7, 1983. (App. 113)

JURISDICTIONAL STATEMENT

The date of the original Opinion in this case issued by the Court below is December 31, 1992. A Petition for Rehearing and Suggestion of Rehearing en banc was filed on January 8, 1993 and denied on February 12, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 10 of this Court.

STATUTORY PROVISIONS

1. Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a).
2. Section 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. §158(d).

STATEMENT OF THE CASE

Historical Facts

The historical facts which gave rise to this litigation are brief and undisputed. These facts are concurrently set forth in the Opinion rendered by the Eighth Circuit with regard to the first appeal in this action, *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local #433 and Metz Baking Company*, 826 F.2d 735 (8th Cir. 1987), *Cert. denied*, 484 U.S. 1062, 108 S.Ct. 1019, 98 L.Ed.2d 984 (1988) (App. 37) and the Pre-Trial Order dated February 28, 1985 (App. 101).

The Petitioners herein were employees of Interstate Brands Corporation ("IBC") employed as production employees in this employer's bakery facility located on Leavenworth Street in Omaha, Nebraska. On February 19, 1983 Metz Baking Company ("Metz"), a competitor, purchased the plant, equipment and routes of IBC, taking possession on February 21, 1983.

The agreement between IBC and Metz was set forth in a purchase agreement executed by both parties. At the time, Metz had an existing bakery facility located on Nicholas Street in Omaha, Nebraska.

Subsequent to consummation of the purchase of the IBC facility, Metz owned and operated two separate bakery facilities in Omaha with two separate groups of employees. Labor relations for each group of employees were controlled by a multi-employer collective bargaining agreement negotiated by Metz, IBC and another bakery with the Union that represented both groups of employees, Bakery, Confectionery and Tobacco Workers Union Local #433 ("Union").

While the collective bargaining agreements applicable to the Nicholas Street plant and the Leavenworth Street plant were identical in terms, they applied, separately, to each bargaining unit at each location.

The collective bargaining agreements at each location, effective from May 2, 1982 through May 5, 1985 provided, in part, at Article X, Seniority, as follows:

> Section 4. In the event it becomes necessary to reduce the working force for the lack of business or other legitimate reasons, the last person hired in the plant shall be the first person laid off and in returning to work the last person laid off shall be the first person recalled, for a permanent full time job.
>
> Section 5. Regular full time employees with thirty (30) days or more seniority in the plant may in the case of lay-off apply their plant seniority as follows:
>
> A. Employees may replace employees in order of seniority.
>
> B. The employees who are laid off and exercise their plant seniority shall carry forward their plant seniority.

Additionally, at Article XVIII, Management, Discharge and Discrimination, no employee could be discharged, except for "just cause".

Upon the acquisition by Metz of the IBC facility it employed the Petitioners, who had seniority rights under the collective bargaining agreement, and all other former IBC employees (part-timers without seniority) and continued the bakery operations at that location without taking job applications or notifying the employees of any change in their employment status.

In March, 1983, Metz decided to close its Nicholas Street production facility, notified the Petitioners herein (Leavenworth Street employees) that it considered them "new hires" with an effective seniority date of February 19, 1983, unilaterally merged the seniority lists of the

Nicholas Street and Leavenworth Street employees and effectively endtailed the Petitioners to the full-time Nicholas Street employees and promptly laid off all of the Leavenworth Street employees on either March 8th or 22nd. Metz transferred the Nicholas Street employees to Leavenworth Street and honored the plant wide seniority of the Nicholas Street employees earned at that facility at the Leavenworth Street facility.

The Union never requested or demanded negotiations with Metz regarding these events or their impact upon both groups of employees and, since it represented both groups, it assumed a "neutral" position with regard to the claims of each group of employees.

Metz and the Union have never negotiated with regard to this matter and the collective bargaining agreement, which provided for continuation of the agreement subsequent to its termination, absent written notice by either party, has been renegotiated on three separate occasions (1985-1988; 1988-1991; 1991-1994) without any change or modification in the above-referenced seniority provisions or with regard to the need for just cause with regard to termination.

The Leavenworth Street employees caused a grievance to be filed alleging a breach by Metz of the Leavenworth Street collective bargaining agreement and the matter proceeded to arbitration.

Arbitration Proceedings

The matter proceeded to arbitration with the question presented being whether or not Metz had breached the Leavenworth Street collective bargaining agreement and, if so, what remedy was appropriate. The Union, while continuing its "neutral" position, represented both groups of employees. The Union's primary witness at the arbitration hearing was the Vice President and General Counsel in charge of labor relations for Metz. This individual testified at the arbitration proceedings that Metz, in its Purchase Agreement with IBC, did not agree to

honor the seniority provisions of the IBC collective bargaining agreement and, further, that IBC was a failing company and that the doors to the Omaha Plant would have soon closed absent the purchase by Metz of this facility. The arbitrator denied the grievance of the Leavenworth Street employees on June 7, 1983 (App. 113).

The §301 Action.

The Leavenworth Street employees, subsequent to a denial of their grievance, engaged their prior counsel and brought this §301 action, federal jurisdiction existing under 29 U.S.C. 185(a) and (c), against Metz, claiming a breach of the collective bargaining agreement and, against the Union, claiming a breach of its duty to fairly represent them. The matter was bifurcated with the issue of liability being tried to a jury. The matters tried to the jury included the Leavenworth Street employees' §301 action and, additionally, the claim that the Union had breached its duty owed to the Leavenworth Street employees under the National Labor Relations Act by not negotiating with Metz with regard to their seniority rights. (App. 106-7).

The liability trial was had in July of 1985 and the jury was instructed with regard to both claims of the Leavenworth Street employees (App. 87) and the jury, pursuant to a Special Verdict (App. 97) determined, with regard to Plaintiffs' §301 action, that: the Union had breached its duty to the Leavenworth Street employees in the manner in which it handled the grievance and arbitration proceedings; that this breach tainted the arbitration award; that Metz impliedly and expressly agreed to be bound by the seniority provisions of the Leavenworth Street collective bargaining agreement; that Metz breached the seniority provisions of this collective bargaining agreement; and, that the Plaintiffs were laid off as a result of Metz' breach of the collective bargaining agreement (Special Verdict questions and answers 3-8).

Additionally, the jury found that the Union breached its duty in not negotiating with Metz regarding Plaintiffs' seniority rights upon Metz' purchase of the IBC facility and that had the Union so negotiated, Metz would not have laid off the Plaintiffs in March of 1983 (Special Verdict questions and answers 1 and 2).

No evidence was adduced that the former IBC facility was a "failing" enterprise. Additionally, the purchase agreement between Metz and IBC contained broad language regarding Metz' express assumption of the IBC labor agreement.

In August of 1986 the Trial Court granted judgment n.o.v. in favor of Metz and the Union, vacated the jury's Special Verdict and entered judgment in their favor (App. 63). The District Court specifically found that since the Nicholas Street employees outnumbered the Leavenworth Street employees, the Union's failure to negotiate on behalf of the Leavenworth Street employees was, at best, a "futile" act and could not be sustained. The Trial Court also found that the Union's actions were at worst merely negligent and that even if the Union did breach its duty to the Leavenworth Street employees, that this breach could not have "tainted" the arbitration award.

The Leavenworth Street employees duly appealed the Trial Court's decision.

The First Appeal

On Plaintiffs' appeal to the Eighth Circuit from the Trial Court's grant of judgment n.o.v. the Eighth Circuit not only reinstated the jury's Special Verdict but, further, directed the entry of a judgment on liability against Metz and the Union. *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local #433 and Metz Baking Company, supra.* (App. 37).

The Eighth Circuit concluded that the jury was correct in its determination that Metz was bound by the seniority provisions of the Leavenworth Street collective bargaining agreement, had breached those provisions and had wrongfully laid the Plaintiffs off. The Eighth Circuit

found that the Union had lied to and deceived the Leavenworth Street employees and had failed to fairly represent them with regard to the grievance and arbitration proceedings. The Eighth Circuit also directed the Trial Court in footnote 1, with regard to the Union's failure to negotiate on the Leavenworth Street employees' behalf, to determine who would have voted with regard to any negotiated resolution in order to assist the Trial Court in determining the range of solutions which would have been possible with regard to any such negotiations.

The Eighth Circuit remanded this matter to the District Court for a determination of appropriate remedies due the Leavenworth Street employees.

Subsequent to the denial by the Eighth Circuit of a motion for rehearing by Metz and the Union, these parties filed a Petition for Writ of Certiorari with this Court which was denied in February of 1988.

On Remand

Upon the return of this matter to the District Court a judgment on liability was entered in favor of the Leavenworth Street employees and against Metz and the Union in August of 1988. The Trial Court also allowed the former Nicholas Street employees to intervene as defendants in this action. Additionally, the Trial Court allowed Metz and the Union to amend their respective answers to assert, as a defense to the damage and remedy claims of the Leavenworth Street employees, that Metz and the Union could have negotiated with regard to the merger issue in 1983 and, if they had done so, an agreement modifying the collective bargaining agreement extinguishing the seniority rights of the Leavenworth Street employees and endtailing them to the Nicholas Street employees would have been agreed to, submitted to the joint group of Nicholas Street and Leavenworth Street employees and ratified thus, extinguishing any claim for damages or remedies by the Leavenworth Street employees.

Subsequent to the remedy/damage trial which spanned almost two months (15 to 18 days of actual trial), the District Court entered its Memorandum Opinion on October 11, 1991 (App. 11). On this same date the Trial Court entered its Order and Judgment (App. 31) granting the Leavenworth Street employees damages only for the period from their lay offs in March to June 15, 1983 against all Defendants. Subsequently, the Trial Court's Order and Judgment was modified to clarify that Judgment was entered only against Metz and the Union and that the Interveners were dismissed as parties to the action. (App. 34).

The Trial Court, in limiting the remedy and damages due the Leavenworth Street employees, relied upon the previously referred to footnote in the prior Eighth Circuit Court Opinion to conclude that Metz and the Union were not bound by the collective bargaining agreement in existence but, rather, that the remedy due the Leavenworth Street employees was limited to the time period during which the Trial Court believed it would have taken Metz and the Union to have negotiated and had ratified an agreement extinguishing the Leavenworth Street employees' seniority rights. The Court stated:

> . . . It would have been possible for Metz and the Union to have negotiated a solution to the post-merger seniority problem and proposed it to the Union membership for ratification. If the collective bargaining agreement had been modified, then there could not have been a grievance based on breach of contract and, therefore, no need for arbitration. (App. 18).

The Trial Court further concluded that the burden was on the Leavenworth Street employees to prove that any such hypothetical negotiated agreement between Metz and the Union, extinguishing their seniority rights, would not have been ratified by the joint group of Nicholas and Leavenworth Street employees. The Court stated:

> Accordingly, the task facing this Court is to determine, to the extent possible, how the seniority rights of all post-merger Metz employees, including those of the former IBC employees, would have been modified had the Union and Metz negotiated the merger. Such negotiated changes would have to be ratified by a majority vote of the eligible membership . . . the burden was on the plaintiffs to show that such contractual changes would not have been ratified, and it is clear from the evidence presented at trial that they could not and did not carry that burden. (App. 18).

Considering the above, even more intriguing and, perhaps, paradoxical is the following passage from the Court's Opinion:

> Although plaintiffs cannot prove they would have suffered any loss after the collective bargaining agreement would have been modified and, therefore, are not entitled to any remedy after that date, the jury specifically found that they would not have lost their full-time positions had Metz and the Union complied with the collective bargaining agreement as it existed at the time of the layoffs. The necessary conclusion, therefore, is that the plaintiffs would have had their jobs until the collective bargaining agreement was modified and were wrongfully denied the income they would have earned under the existing agreement. (App. 20).

The trial Court denied the Leavenworth Street employees' request for attorney fees determining that attorney fees were not properly a component of the compensatory damage claim of the Leavenworth Street employees and that bad faith had not been proved to the satisfaction of the Court. (App. 29). The Trial Court, additionally, denied the Leavenworth Street employees' request for interest on all sums due them from the date of the loss. (App. 32).

The Leavenworth Street employees, once again, duly appealed the decision of the Trial Court.

The Second Appeal

The Eighth Circuit affirmed the Trial Court in all respects. The Appellate Court summarily dispelled any notion that the Trial Court had misinterpreted its prior Opinion. The Appellate Court concluded that Metz and the Union would have had to have negotiated in 1983 and that since Metz consolidated operations and had a surplus of employees, that it was merely unfortunate for the Leavenworth Street employees that, since lay offs were required, they were the individuals who would have been laid off in any case. The Court stated:

> . . . Since Metz could not have kept all of the employees from both workforces, and the collective-bargaining agreement had no provision governing labor in the event of a corporate merger, the collective-bargaining agreement would have had to be modified. In footnote 1 we ordered the District Court to determine when that modification would have been if proper negotiations had in fact taken place. (App. 3).

The Eighth Circuit, utilizing, with liberality, the abuse of discretion standard, found no error in the Trial Court's denial of attorney fees and interest.

The Petition for Rehearing filed by the Leavenworth Street employees on January 8, 1993 was denied on February 12, 1993. (App. 85).

ARGUMENT

I. THE DAMAGE AND REMEDY CLAIMS OF AN EMPLOYEE UNDER A §301 ACTION ARE MEASURED AND CONTROLLED BY THE COLLECTIVE BARGAINING AGREEMENT IN EXISTENCE.

The claims of the Leavenworth Street employees against Metz for breach of contract and against the Union

for breach of its duty regarding the grievance and arbitration proceedings arise under §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Just as the claims of the Leavenworth Street employees with regard to their contractual seniority rights are dependent upon and measured by the collective bargaining agreement in existence, so, too, the remedy or damages due the Leavenworth Street employees must be measured by this same collective bargaining agreement. The Eighth Circuit's acceptance of the District Court's speculation of what might have occurred in 1983, had Metz and the Union negotiated, is explicitly contrary to the most fundamental precept underlying labor relations; that the parties to a collective bargaining agreement are bound by that agreement until such time as the agreement is properly or "legally" modified. No such modification has ever occurred and, in fact, Metz and the Union have never even negotiated with regard to the Leavenworth Street employees' seniority rights nor the "merger" issues.

The Leavenworth Street employees, having borne the rather heavy burden of proving that Metz assumed the collective bargaining agreement and breached the seniority provisions in laying them off and, also, in proving that the Union had failed to fairly represent them, were granted a back pay award limited solely to net lost wages and holiday pay for an approximate three month period. The Trial Court and the Eighth Circuit even denied the Leavenworth Street employees any damages

with regard to other economic losses such as pension benefits or contributions, vacations, health insurance out-of-pocket losses, overtime wages and the like. Nor were damages awarded to Petitioners for lost seniority or future damages. The Leavenworth Street employees submit that, absent a "legal" modification of the relevant terms of the collective bargaining agreement, their claims for an appropriate remedy must be measured by the same collective bargaining agreement upon which they were required to base their claims with regard to the liability portion of this action.

Section 8(d) of the National Labor Relations Act provides, in part, as follows:

> [W]here there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
>
> The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract . . . 29 U.S.C. §158(d) (App. 126).

Metz and the Union, by reason of §8(d), were both bound to honor the collective bargaining agreement which Metz, as a successor employer, expressly assumed. Notwithstanding repeated renegotiation of this agreement and the failure to ever attempt to negotiate or modify this agreement in any material respect with regard to the issues involved in this litigation, neither Metz nor the Union have ever honored the Leavenworth Street collective bargaining agreement and, in fact, can only respond to the remedy and damage claims of the Leavenworth Street employees by claiming that *had* they negotiated, they would have extinguished those seniority rights which continue to this very day.

This Court in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972), in discussing the impact of a successor employer being bound by the substantive provisions of the prior employer's collective bargaining agreement, at pages 288-9, 1582-3 and 73-4 stated:

> It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with the provisions of the contract and subject

> to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor. Nor would the union commit a §8(b) (3) unfair labor practice if it refused to bargain for a modification of the agreement effective prior to the expiration date of the agreement. A successor employer might also be deemed to have inherited its predecessor's pre-existing contractual obligations to the union that had accrued under past contracts and that had not been discharged when the business was transferred . . . (footnotes omitted).

This view was reiterated in this Court's decision of *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board, et al.*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed2d 46, 261-2, 2243 and 56 (1974).

The Petitioners herein suggest to this Court that the Eighth Circuit, in adopting whole-heartedly the decision of the Trial Court, has closed its eyes to this Court's prior Opinions and §8(d) of the NLRA. The Eighth Circuit's conclusion that Metz and the Union would have had to have negotiated in 1983 regarding the merger may be a proper statement of what could have occurred if, in fact, Metz and the Union wished to accord the Nicholas Street employees any greater seniority rights than that dictated by the Leavenworth Street agreement. However, history reflects that no such negotiations have ever occurred. The jury's Special Verdict confirmed Petitioners' seniority rights and determined that the collective bargaining agreement had been breached resulting in their wrongful termination. §8(d) of the NLRA uncategorically requires

both Metz and the Union to honor the collective bargaining agreement and the seniority rights of the Petitioners.

For the Eighth Circuit to suggest that the collective bargaining agreement did not address the issue of seniority rights is to ignore the clear and unambiguous terms of the agreement regarding plant wide seniority. While Petitioners acknowledge that there is no specific provision of the contract which uses the word "merger", the jury had already specifically found that the contract, as written, protected the Petitioners from layoff by reason of their plant wide seniority. This was and is the law of the case. *In Re: Sanford Fork & Tool Co., et al.*, 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414 (1895) and *Bethea v. Levi Strauss and Co.*, 916 F.2d 453 (8th Cir. 1990).

Any suggestion that Metz was required to consolidate production in one facility or was required to lay off any employee is an assumption without foundation. These were business decisions, assumedly profitable ones, made by Metz which just happened to breach the collective bargaining agreement at the Leavenworth Street facility. As this Court indicated in *W.R. Grace and Co. v. Rubber Workers Local #759*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298, 113 LRRM 2641 (1983) economic necessity is not a recognized defense to a breach of contract claim. Just as the employer in *W.R. Grace, supra*, sought to have its male employees bear the loss of its ill-fated decision to follow an agreement with the EEOC, so too, here, Metz seeks to have the Petitioners bear the loss for its business decision to lay off employees, albeit that decision breached the collective bargaining agreement.

The Eighth Circuit viewed the remedy claims of the Petitioners in relation to the rights and status of the Nicholas Street employees, most of whom are still employed by Metz. This simply begs the issue. While the Petitioners have never requested that any former Nicholas Street employee presently employed by Metz suffer a loss of employment, the issue presented and decided at the liability trial was the claim of the Petitioners to superior seniority rights as between the two

groups of employees. Layoffs under the contract were controlled by plant wide seniority. The Nicholas Street employees had no plant wide seniority at the time of the layoffs and the collective bargaining agreement has never been modified to provide them any such seniority.[1] Petitioners do not suggest that the Nicholas Street employees should pay the price for the wrongdoing of Metz and the Union. Just as in *W.R. Grace, supra,* the employer and the union are responsible for the wrongful termination of Petitioners' employment. The wrongdoers, Metz and the Union, are the responsible parties to bear any loss sustained by the Petitioners associated with their breach of contract claims pursuant to the existing contract.

The Eighth Circuit's Opinion is contrary to every opinion issued by this Court or any other Circuit Court which requires that the remedy due the Petitioners be based on the collective bargaining agreement in existence rather than a hypothetical contract based upon hypothetical negotiations and a hypothetical ratification. In fact, the Eighth Circuit's Opinion is contrary to its own hallmark decision in *Richardson v. Communication Workers of America, AFL-CIO,* 486 F.2d 801, 806 (8th Cir. 1973) wherein it explicitly set forth the manner in which damages were to be measured in §301 actions. The period of time for which damages are due from the wrongdoers, Metz and the Union, cannot be limited by the inventive

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[1] The Nicholas Street employees did not have 30 days or more seniority in the Leavenworth plant nor did they have any Leavenworth plant seniority to exercise with regard to any layoffs even assuming that the unilateral action of Metz in merging the two seniority lists did not itself violate the bargaining agreement. In *Teamsters Local No. 42 v. NLRB,* 825 F.2d 608 (1st Cir. 1987) at pages 612-614 the First Circuit considered the seniority rights of two separate bargaining units at separate plants upon a consolidation at one of the plants or at an entirely new facility and reached the same conclusion as the jury in this action, plant wide seniority at one plant does not transfer to another location.

and self-serving claims of the wrongdoers that they could have modified the seniority provisions of the collective bargaining agreement which the company had breached. Historical fact confirms that this claim of Metz and the Union is without merit.

Research with regard to this somewhat novel defense asserted by Metz and the Union has resulted in finding only one other reported decision in which an employer or union sought to defend an employee's §301 action by asserting a claim that the defendants could have renegotiated the collective bargaining agreement to provide for endtailing of the plaintiffs, contrary to the contract's explicit provisions, and were therefore free to disregard the seniority provisions of the contract *Lewis v. Tuscan Dairy Farms, Inc., et al.*, 752 F.Supp. 116 (S.D.N.Y. 1990). That Trial Court found that the union's refusal to follow the fixed rules and standards of the collective bargaining agreement with regard to seniority rights constituted a breach of its duty and that the union was not free to simply ignore the terms of the contract. The Court then stated:

> That is not to say that the union could not have renegotiated the contract, as it did to deal with the crisis created by the Farmland decision, to provide for endtailing rather than dovetailing of seniority, even though to do so would have disserved the Ozone Park employees. That it could have done, so long as it complied with all rules applicable to ratify such an amendment. PAPCIN V DICHELLO DISTRIBUTORS, Inc., 697 F.SUPP 73, 81 (D.Conn.), aff'd, 862 F.2d 304 (2d Cir.1988); Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir.1974). It was not free, however, simply to disregard the contract . . . *supra* at 124.

Interestingly, the lower court in *Tuscan, supra,* in reaching its conclusion, relied not only on *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) but also on an Eighth Circuit decision, *Butler v. Teamsters Local 823,*

514 F.2d 442, 453-54 (8th Cir.), *cert. denied*, 423 U.S. 924, 96 S.Ct. 265, 46 L.Ed.2d 249 (1975). In *Butler, supra*, the Eighth Circuit concurred that a union breaches its duty to the plaintiffs by not insisting that the employer adhere to the contract's seniority provisions. Likewise, in the instant action, the Union has never taken any action to require Metz to abide by the terms of the collective bargaining agreement regarding the Petitioners' seniority rights.

Perhaps even more disconcerting is the Eighth Circuit's confirmation of the Trial Court's conclusion that the Petitioners bore the burden of proving that the hypothetical agreement, which assumedly would have been effected by reason of hypothetical negotiations, would not have been ratified by the appropriate Union membership. While such an obligation might exist with regard to an action premised purely upon the failure of a union to properly negotiate on Petitioners' behalf, Petitioners sought only a declaratory judgment and nominal damages with regard to the Union's failure to negotiate and premised their damage claims upon the §301 action.[2] The transposition of the Petitioners' burden of proof, applicable to a failure to negotiate claim to their §301 claim, is an emasculation of federal labor law with regard to §301 actions.

In its truest sense, the Eighth Circuit's Opinion allows a Trial Court to modify, retrospectively, the collective bargaining agreement between the wrongdoing

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[2] Several Circuit Courts have indicated that a plaintiff has the burden to prove, in a failure to negotiate action, not only the terms of the alleged agreement between the union and employer but, also, that such an agreement would have been ratified. See *Anderson v. United Paperworkers International Union AFL-CIO*, 641 F.2d 574, 580 (8th Cir. 1980), *Wood v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 406*, 807 F.2d 493, 502-3 (6th Cir. 1986) and *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018-20 (3rd Cir. 1977).

Defendants, as claimed by the wrongdoers, to the detriment of the wrongfully laid off employees, the third party beneficiaries of the agreement. Even more fatal to the position adopted by the Eighth Circuit, this retroactive modification is accomplished in the face of historical fact reflecting the failure of Metz and the Union to have so modified the collective bargaining agreement through negotiations and submission of any such proposed changes to the appropriate membership.

No court can modify a collective bargaining agreement entered into between an employer and a union, absent an illegal provision, either for the benefit of the employer and union or, contrarily, for the benefit of the employees seeking to establish their rights in a §301 action. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 100 S.Ct. 410, 62 L.Ed.2d 394 (1979) at 219, *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), at 576 and *W.R. Grace and Co. v. Rubber Workers Local #759, supra.*

The Circuit Court's Opinion, just as the Trial Court's decision, conveniently ignores the duty owed by the Union and the majority group of employees to a minority group such as the Petitioners. This duty is set forth in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). Several Courts have determined that, absent an "objective justification" by the union and majority group of employees, established seniority rights of a minority group may not be diminished. *Barton Brands v. NLRB*, 529 F.2d 793, 799 (7th Cir. 1976), *Deboles v. Trans World Airlines, Inc., supra*, at 1016 *Hargrove v. Brotherhood of Locomotive Engineers, et al.*, 116 F.Supp. 3, 7-8 (U.S.D.Co. 1953) and *Teamsters Local Union No. 42 v. NLRB, supra*, at 611-14.

Absent a reversal of the Eighth Circuit's decision in this matter, employers and unions in future §301 actions will be allowed to sit and watch as a plaintiff employee attempts to prove a breach of collective bargaining agreement and breach of the union's duty based upon the

existing agreement and then, if necessary, defend any damage claims by jointly asserting that they could have modified the terms of the collective bargaining agreement which the employer had breached. Then, at least according to the Eighth Circuit's decision in this case, the issue left to the Trial Court is whether the employee can then prove a negative; that the appropriate union membership would not have voted to ratify any such hypothetical renegotiated agreement.

If, in fact, the employee could not prove that a majority would not have ratified such a hypothetical agreement, the "successful" employee would be allowed damages solely for the time period which the Trial Court would determine, by its inference or intuition, that it would have taken the defendants to have so renegotiated and had ratified such an agreement. Petitioners suggest that §8(d) of the NLRA compels a rejection of the approach taken by the Eighth Circuit with regard to this matter. Metz and the Union are bound by the collective bargaining agreement which has been in existence since the wrongful layoffs of the Petitioners in March of 1983.

II. IN A §301 ACTION BY AN EMPLOYEE, ATTORNEY FEES ARE AN ELEMENT OF COMPENSATORY DAMAGES.

The Trial Court in this action refused to award the Petitioners attorney fees. The Trial Court stated as follows:

> Plaintiffs argue that they should be allowed to recover the attorney fees as an element of damages, not as fees per se. Although other circuits have allowed such recovery, *see e.g. Scott v. Local Union 377, International Brotherhood of Teamsters, etc.*, 548 F.2d 1244, 1246 (6th Cir. 1977), the Eighth Circuit has expressly held that attorneys' fees may not be considered as compensatory damages. *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978) ("Attorney's fees

> incurred in bringing a §301 action do not rise to the status of compensatory damages"). Attorneys' fees will not be awarded . . . (App. 29).

The Eighth Circuit determined that the Trial Court's determination that attorney fees were not properly awardable under the bad faith exception to the traditional American rule regarding the award of attorney fees was not an abuse of discretion. (App. 8). The Eighth Circuit's view that attorney fees are not a portion of an employee's compensatory damage claim in a §301 action was originally stated in *Richardson v. Communication Workers of America*, 530 F.2d 126, 132, (8th Cir. 1976). This view is shared by the Eleventh Circuit as expressed in *Varnes v. Local 91 Glass Bottle Blowers, etc.*, 674 F.2d 1365, 1369 (11th Cir. 1982) and by the District of Columbia Circuit in *Washington Hospital Center v. Service Employees International Union, Local 722, AFL-CIO*, 746 F.2d 1503, 1509 (D.C. Cir. 1984).

The position of the Eighth Circuit that attorney fees are not properly part of the compensatory damages due an employee in a §301 action is contrary to this Court's decision in *Vaca v. Sipes, supra* and *Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970). *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) did not overrule these Supreme Court cases.

Whether *Alyeska Pipeline, supra*, has modified *Vaca v. Sipes, supra*, regarding whether attorney fees are part of an employee's §301 compensatory damage claim has been addressed in several other Circuits. Except for the Eighth Circuit, Eleventh Circuit and District of Columbia Circuit, the other Circuit Courts which have addressed this issue have been unanimous in their disapproval of this position. The Third Circuit, in *Ames v. Westinghouse Electric Corp.*, 864 F.2d 289 (3rd Cir. 1988), stated:

> . . . The claim that the Union breached its duty of fair representation is predicated upon the duties which are imposed by the federal labor law on collective bargaining representatives

> with respect to the enforcement of collective bargaining agreements. Among those duties is the fair and prompt consideration and, if dictated by controlling legal standards, processing on behalf of employees of their claims under contract dispute resolution procedures. Absent the alleged breach of that duty, Ames would not have been required to retain an attorney in order to pursue his contract remedies against Westinghouse. When there is a legal duty to provide representation, whether that duty arises out of a contractual undertaking or, as here, by operation of law, if the representation is wrongfully withheld, the cost of substitute representation should be recoverable damages. This is not to say that in the suit against the Union fee shifting as such would be appropriate. Rather, the employee should recover as damages from the Union only the attorneys' fees incurred in pursuing the section 301 claim against the employer – consequential damages flowing from the Union's alleged breach of its duty of fair representation. We join those courts of appeals which have so held. *See, e.g., Bagsby v. Lewis Bros, Inc. of Tenn.*, 820 F.2d 799, 801 (6th Cir.1987); *Zuniga v. United Can Co.*, 812 F.2d 443, 454-55 (9th Cir.1987); *Stanton v. Delta Air Lines*, 669 F.2d 833, 838 (1st Cir.1982); *Seymour v Olin Corp.*, 666 F.2d 202, 215 (5th Cir. Unit B Jan. 1982); *Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61*, 620 F.2d 439, 444 (4th Cir.1980); *see also Bygott v. Leaseway Transp. Corp.*, 637 F.Supp. 1433, 1442 (E.D.Pa.1986); *Chuy v. National Football League Players Ass'n*, 495 F.Supp. 137, 141 (E.D.Pa.1980). *Supra* at 293.

The First, Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuits have concluded that attorney fees are properly a portion of the compensatory damages due an employee in a §301 action. The Seventh Circuit, in *Bennett*

v. Local Union No. 66, 958 F.2d 1429, 1439-40 (7th Cir. 1992), subsequent to concluding that an employee was allowed to recover, as compensatory damages, not only back pay, but also, attorney fees reasonably incurred to press the claim against the employer further stated:

> We do not agree with the Union's contention that this rule is a "judicially created exception" to the American rule against fee-shifting. A central purpose of the American rule is to avoid penalizing the losing party simply because it chose to defend or prosecute a lawsuit. *See Summit Valley Industries, Inc. v Local 112, United Bhd. of Carpenters*, 456 U.S. 717, 724, 102 S.Ct. 2112, 2116, 72 L.Ed.2d 511 (1982). In the present context, however, the fees are not awarded as a penalty, but rather as proximate consequential damages for the union's failure to provide representation: the expense that Bennett has incurred in pursuing her contractual grievance against the Company "is not merely a result of the harm that [the Union] did [her]; it is the harm itself." *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1275 (9th Cir.1983). To avoid conflict with the American rule, courts generally limit fees awarded as damages in hybrid section 301 cases to the expenses incurred in pursuing the claim against the employer, and not the claim against the union. *See, e.g., id.* at 1275 & n.3; *Ames*, 864 F.2d at 293. Here, however, the employer and the Union participated in each other's breach; indeed, the Company's breach of the labor contract in this case depended upon the Union's abandonment of its representation. Because we agree with the district court that the fees incurred in both components of this hybrid action were "necessarily intertwined," we conclude that the award of all reasonable attorney's fees as damages was proper. (footnote omitted). *Supra* at 1440.

In the instant action, the Trial Court found joint and several liability having determined that both Defendants should bear equal responsibility and that Metz had participated in the Union's breach of duty. (App. 28) Attorney fees should have been awarded as compensatory damages to the Petitioners. This Court should accept this matter and resolve the split among the Circuits with regard to this issue.

Even if the traditional American rule is to be followed, the bad faith exhibited by both Metz and the Union, as reflected in the Opinion of the Eighth Circuit on the first appeal on this matter (App. 37), justifies an award of attorney fees based upon bad faith.

III. IN A §301 ACTION, INTEREST IS TO BE AWARDED IN ORDER TO MAKE THE EMPLOYEE WHOLE.

The Petitioners at the Trial Court level had requested interest on their backpay awards in the same manner that the NLRB grants interest on backpay awards ordered by it.[3] The NLRB has determined that, on backpay due, interest accrues commencing with the last day of each calendar quarter of the backpay period for the amount due and owing for each quarterly period, until paid, and computed at the "short-term Federal rate" for the underpayment of taxes to the IRS. See *New Horizon*, 125 LRRM 1177 at 1178. The Trial Court did not address this issue in its Memorandum Opinion but did provide in its Order and Judgment "No prejudgment interest is awarded." (App. 32).

The Eighth Circuit affirmed the Trial Court and stated as follows:

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[3] The Trial Court received into evidence the reports of Petitioners' expert for each Petitioner reflecting lost wages, fringe benefits and interest for each calendar quarter from March, 1983 through 1990, based upon the rate utilized by the NLRB. Exhibits 1(b) through 40(b).

> With respect to the prejudgment interest, the plaintiffs argue that the District Court abused its discretion by denying it since, they claim, it is ordinarily granted absent bad faith, dilatoriness, or the assertion of frivolous claims on the part of the plaintiff. Plaintiffs have misstated the proper legal standard. Like attorneys' fees, an award of prejudgment interest is within the discretion of the trial judge; it is never automatic. We see no evidence here that the District Court abused its discretion. (App. 8).

This is not a case where a jury was asked to determine damages and the Petitioners were requesting the Trial Court, thereafter, to award interest. Rather, the remedy and damage claims of the Petitioners were tried to the Court. The true question at issue is not whether the Trial Court abused its discretion, since the Trial Court did not benefit the Eighth Circuit with any statements or reasons as to why interest was not allowed, rather, the issue is whether interest should have been allowed, just as the NLRB allows interest, on backpay awards in order to make the Petitioners "whole". Additionally, if interest is to be allowed, the question arises as to the appropriate interest rate to be utilized and whether state law is to be referred to in determining that interest rate.

This Court has addressed the issue of the allowance of interest on a monetary recovery from the date of loss in *Board of Commissioners of the County of Jackson v. United States of America*, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313, (1939) and *Blau v. Lehman*, 368 U.S. 403, 82 S.Ct. 451, 7 L.Ed.2d 403, (1962) wherein this Court stated:

> . . . This Court has said in a kindred situation that "interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." *Board of Commissioners v United States*, 308 U.S. 343, 352. *Supra* at 414.

The First Circuit has addressed this issue in *Colon Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933, (1st Cir. 1992) and stated as follows:

> . . . In *Red Star Express Lines v. International Brotherhood of Teamsters Local 170*, 809 F.2d 103 (1st Cir.1987), we held that it was appropriate for the court in an action brought under the Act to grant pre-judgment interest. The court has proper discretion under its equitable powers to do so as long as the interest deals with tangible losses. *Id.* at 107. *See also De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 290 (1st Cir.), *cert. denied*, 400 U.S. 877, 91 S.Ct. 117, 27 L.Ed.2d 114 (1970). In the instant case, the district court granted pre-judgment interest on tangible losses – lost earnings. We conclude that the court did not err in granting pre-judgment interest. *Supra* at 941.

The First Circuit also determined that the appropriate rate of interest to be utilized was one gleaned from the law of the state where the case arose.

The Petitioners suggest to this Court that interest should be provided on backpay awards under §301 actions by an employee in an identical fashion and for the same reasons as interest is awarded on backpay awards by the NLRB. The Board awards interest as a matter of right in order to make an employee "whole". The fact that the Board may not accept an employee's challenge to the actions of an employer and a union as an unfair labor practice and that an employee is required to file suit under §301 should not diminish the employee's recovery. Whether an employee pursues a vindication of his individual rights under a §301 action or the Board pursues those rights in an unfair labor practice proceeding, the remedy provided, in order to make the employee whole, should be a consistent remedy. Federal labor policy, to be consistent, demands that the remedy due an employee under either a Board proceeding or under a §301 action be consistent.

In the instant action where over ten years has elapsed since the wrongful termination of the employment of each of the Petitioners, it can hardly be argued that it would be "inequitable" to award interest on the backpay award due the Petitioners.

The rationale previously advanced by the Eighth Circuit with regard to interest on backpay awards in proceedings before the NLRB is persuasive and applicable to the claim of the Petitioners for an award of interest. In *Marshfield Steel Company v. NLRB*, 324 F.2d 333 (8th Cir. 1963) the Eighth Circuit stated:

> We accordingly conclude that the Board acted well within its power in providing for the payment of interest on back pay awards. Such awards are in no sense penalties such as were involved in Rodgers. They were not to punish or deter but to *compensate* for the loss sustained by the employees who were wrongfully discharged. They are entirely remedial in character. Republic Steel Corp. v. N. L. R. B., 1940, 311 U.S. 7, 10, 61 S.Ct. 77, 85 L.Ed.6; N. L. R. B. v. Cape County Milling Co., 8 Cir., 1944, 140 F.2d 543, 546. To make such employees whole, the provision for the payment of interest for the time the back pay was wrongfully withheld from them is only equitable. During that period the petitioner had the use of the money it wrongfully withheld and we can see no reason why it should not pay for its use. Based upon the Supreme Court's statement in Rodgers, we concur with the Second and Fourth Circuits and the Court of Appeals of the District of Columbia that the provision for the payment of interest on back pay is proper and within the Board's power. *Supra* at 338.

There are no facts in this action which would support even a suggestion that an award of interest would be inequitable. Petitioners cannot be made "whole" without such an award. The failure of the Trial Court and the

Eighth Circuit to enunciate any basis to justify the refusal to award interest is fatal to the position of the Eight Circuit. The Eighth Circuit itself has previously held that the failure of the Trial Court to set forth adequate grounds for the denial of interest, in and of itself, requires reversal and the award of interest. *Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F.2d 239, 242 (8th Cir. 1981) and *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 752 (8th Cir. 1986). In *Cargill, supra*, the Court, at 241-2 stated:

> Generally, the award of prejudgment interest, in the absence of statutory directives, rests in the discretion of the district court. *Mid-America Transportation Co. v. Rose Barge Line, Inc.*, 477 F.2d 914, 916 (8th Cir. 1973); *see also Lodges 743 & 1746, International Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *cert denied*, 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976) (hereinafter *Lodges*). Prejudgment interest is to be awarded whenever damages lawfully due are withheld, unless there are exceptional circumstances to justify the refusal. *United States v. Motor Vessel Gopher State*, 614 F.2d 1186, 1190 (8th Cir.1980); *The Wright*, 109 F.2d 699, 702 (2d Cir. 1940).
>
> A vital ingredient in the determination of whether to award prejudgment interest is a desire to make whole the party injured, but in appropriate circumstances compensatory principles must be tempered by an assessment of the equities. *Lodges, supra*, 534 F.2d at 447. No finding was made by the district court that established the existence of exceptional or peculiar circumstances; the district court merely rejected appellant's claim because "the value which appellant placed upon the facility was unreasonably high." *Cargill, Inc. v. Taylor Towing Service, Inc., supra*, 483 F.Supp. at 1099. The district court did not make a specific finding of bad

> faith on the part of appellant; nor did the district court find that appellant was dilatory in bring the suit or that appellant asserted frivolous claims. *Mid-America Transportation Co. v. Cargo Carriers, Inc.*, 480 F.2d 1071, 1074 (8th Cir. 1973); *Mid-America Transportation Co. v. Rose Barge Line, Inc., supra*, 477 F.2d at 916. Thus, we are compelled to remand this issue to the district court with instructions to grant prejudgment interest on the amount of the damages awarded. [footnote omitted]

With regard to the appropriate interest rate to be applied, Petitioners suggest to this Court that the First Circuit's reference to state law, which in this case would result in a 12% interest rate under Nebraska law is, of course, one method of selecting the appropriate interest rate. However, it hardly seems appropriate for purposes of federal labor law that the interest rate to be allowed should depend upon the legislative enactments of the various States. Rather, Petitioners suggest that the interest rate utilized by the NLRB (and the method of computation) is the appropriate benchmark interest rate to be utilized. This would provide uniformity throughout the various Circuits with regard to interest due on backpay awards in §301 actions. The remedy then due any employee who is unable to convince the NLRB to accept an unfair labor practice charge and who seeks to vindicate personal rights through a §301 action will be a consistent remedy in any Federal Court in which the employee files a breach of contract claim.

CONCLUSION

The Petitioners respectfully request the Court order a summary disposition, on the merits, of this matter and direct the Eighth Circuit to remand this matter to the Trial Court with specific instructions that Petitioners' remedy

and damage claims be measured by the collective bargaining agreement in existence since their wrongful termination of employment; that attorney fees are properly awardable as part of Petitioners' compensatory damages; and, that interest is to be awarded on all backpay awards due the Petitioners in the same fashion as interest is awarded on backpay awards by the NLRB. Alternatively, Petitioners request that this Court grant this Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 91-3549NE, 91-3553NE, 92-1563NE, 92-1591NE

Selman Thomas, Jr., et al., Appellants, v. Bakery, Confectionery and Tobacco Workers International Union, Local #433; Metz Baking Company Appellees, Curtis Burton; et al., Intervenors/Appellees.	On Appeal from the United States District Court for the District of Nebraska. (Filed Dec. 31, 1992)

Caption intentionally shortened by Petitioners

Submitted: October 12, 1992

Filed: December 31, 1992

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN, Circuit Judge, and LARSON,* Senior District Judge.

RICHARD S. ARNOLD, Chief Judge.

* The Hon. Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

This is the end of a dispute which began in February of 1983 when the defendant, Metz Baking Company, purchased most of the assets of Interstate Brands Corporation (IBC). The purchase included the plant on Leavenworth Street in Omaha, Nebraska, where the plaintiffs, forty former employees of IBC, worked. The problem arose when Metz closed down its own Omaha bakery and transferred those employees to the Leavenworth plant. Metz then "end-tailed" the former IBC employees, which means it placed them at the bottom of the plantwide seniority list. Consequently, when Metz made labor adjustments to rectify the two-workforce, one-plant problem, it laid off the plaintiffs.

After an unsuccessful attempt at arbitration, the plaintiffs sued Metz and Local No. 433 of the Bakery, Confectionery, and Tobacco Workers Union – the union which represented all of the former employees of IBC and the employees of Metz.[1] The trial was bifurcated, with the idea that relief would be determined later if the jury found the defendants liable. The jury did find the defendants liable, but the District Court granted judgment n.o.v. for the defendants. On appeal, we reversed the judgment n.o.v. and remanded for a determination of appropriate relief. *Thomas v. Bakery Workers Union Local No. 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S.

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[1] Plaintiffs sued the Union for violating its duty of fair representation and Metz for committing a breach of the collective-bargaining agreement. For a full discussion of the liability trial, see *Thomas v. Bakery Workers Union Local No. 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988).

1062 (1988). After a two-month trial, the District Court[2] awarded each plaintiff the equivalent of three months' wages less any income actually earned during that period. The plaintiffs make numerous arguments on appeal. We reject all of them and affirm the judgment of the District Court.

I.

The District Court found the following passage from a footnote in our earlier opinion to be central to its resolution of damages:

> The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine what would have occurred but for the Union's failure to negotiate. Plaintiffs will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely a declaratory judgment and perhaps nominal damages.

Thomas, 826 F.2d at 760 n.1. Since Metz could not have kept all of the employees from both workforces, and the collective-bargaining agreement had no provision governing labor in the event of a corporate merger, the collective-bargaining agreement would have had to be modified. In footnote 1 we ordered the District Court to

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[2] The Hon. Lyle E. Strom, Chief United States District Judge for the District of Nebraska.

determine what that modification would have been if proper negotiations had in fact taken place.

The Court found that a modification would have legally end-tailed the former IBC employees. Thus, it held that Metz could have legally fired the plaintiffs as soon as the modification had been negotiated, proposed, and ratified, which, the Court found, would have been sometime in June. The plaintiffs were therefore entitled to recover for the loss they suffered during the three-month period from mid-March, when they were laid off, until mid-June, when they could have legally been laid off. *Thomas v. Bakery Workers Union Local #433*, No. CV83-0-652, slip op. at 10-12 (D. Neb. October 11, 1991).

II.

Plaintiffs first argue that the District Court erred in its application of footnote 1. They argue that the jury found that had negotiations taken place, the plaintiffs would never have been laid off, because any new agreement would have preserved their seniority rights. This, they add, is the law of the case, and this court did not direct the District Court to re-examine the jury's determination as to the probable result of negotiations. Footnote 1, they claim, merely directed the District Court to apportion damages between the Union and Metz. Having written this passage, we disagree. First, the language in the footnote is not simply referring to an apportionment-of-damages matter. We expressly directed the District Court to determine "who would have voted to ratify a negotiated solution" so it could ascertain what would have occurred – that is, what the solution would have

been – but for the failure to negotiate. Second, the plaintiffs have mischaracterized what the jury decided. Contrary to the plaintiffs' argument, the jury did not find that an agreement preserving the plaintiffs' jobs would have been reached, but that they would not have been laid off in *March* had the Union negotiated. Appellant's Add. 107-08. In fact, the jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to decide who would have ended up with jobs after negotiations.

This brings us to plaintiffs' alternative argument, which is that the District Court erred in holding that the plaintiffs would have been end-tailed if negotiations had taken place. First, they argue, the only persons who would have been entitled to vote to modify the collective-bargaining agreement were the original employees at the Leavenworth plant, that is, the plaintiffs. Second, even if both Metz and IBC employees had voted, there was not enough evidence to support the District Court's determination. We disagree.

First, Metz purchased IBC and transferred its employees to the Leavenworth plant. The collective-bargaining agreement, which governed both workforces, could be modified only by a majority vote of the members affected. See *Thomas v. Bakery Workers Union Local No. 433*, No. CV83-0-652, slip op. at 9 (D. Neb. October 11, 1991). Both workforces were affected; both were entitled to vote. It is unfortunate for the plaintiffs that IBC was bought out by another corporation complete with its own workforce, but Metz's decision to keep open the former IBC plant rather than the Metz plant does not change the fact that Metz's actions and any resultant modification

would have had an impact on both workforces. Both would have voted.

We also reject the sufficiency-of-the-evidence claim. At the time of the merger, there were seventy-nine to ninety-two Metz employees and forty-one to sixty IBC employees who would have been entitled to vote on a modification. The defense presented seventy-nine affidavits of Metz employees stating that they would have voted to end-tail the plaintiffs. Only a majority vote would have been necessary to modify the agreement. The District Court's decision was amply supported by the evidence.

III.

The third claim raised by the plaintiffs is that the District Court erred in its handling of certain procedural matters: the Court should not have allowed the defendants to amend their answers to add the affirmative defense of mitigation of damages; and it should not have permitted intervention by the Metz employees. Plaintiffs claim that in February of 1985, at the first pre-trial conference, the trial judge said that since mitigation had not been pleaded, he was not going to allow either defendant to amend its pleadings to add this affirmative defense. The plaintiffs add that the undue delay, more than two years after the original filing of the defendants' answers, prejudiced them. The plaintiffs miss the mark on the undue-delay claim. The defendants filed these amendments immediately after we remanded the case for a determination of the appropriate remedy, before any pre-trial discovery. The plaintiffs had nearly two years to

conduct discovery on this issue. This is not undue delay. More importantly, no one except plaintiffs' counsel remembers an order permanently disallowing a mitigation-of-damages amendment. In fact, the judge, in response to a letter from the plaintiffs on the issue, said

> My usual procedure would have been to reduce rulings to writing if they were to be regarded as establishing the law of the case. Also, since we were deferring the issue of damages . . . I am uncertain as to why I would have made such a ruling at that point in time. . . .

Union's Brief 53. We therefore reject the plaintiffs' argument that the District Court erred in allowing the defendants to add the affirmative defense to their answers. We cannot enforce an alleged off-the-record order as to which recollections differ.

The plaintiffs next argue that the District Court abused its discretion in allowing seventy-nine Metz employees to intervene in this action. They claim that the intervenors' rights had already been determined in the liability trial, and anyway, it was too late to intervene. We reject the plaintiffs' arguments. The intervenors' rights were not determined in the liability trial. The Metz employees' seniority rights were not in issue. In any event, any rights the intervenors had were adequately protected by Metz in the liability phase of the trial, since Metz was defending its action in end-tailing the plaintiffs, an action the Metz employees approved of. The intervenors had a substantial interest in the remedy phase of the trial, however, since a decision to reinstate the plaintiffs, dove-tail them with the Metz employees, or end-tail the Metz employees would substantially affect

their rights. Moreover, Metz would not have protected their interests adequately, because it might have favored reinstatement of the plaintiffs to lessen its damages. The motion was timely since it was filed immediately after we remanded the case for the determination of relief, precisely the element of this action in which the intervenors had an interest.

IV.

The plaintiffs' next argument is that the District Court erred in denying attorneys' fees and prejudgment interest. With regard to attorneys' fees, the plaintiffs claim that we had already found the Union guilty of bad faith. Therefore, they reason, the District Court was required to award attorneys' fees. The plaintiffs are straining a bit on this argument. The question of bad faith sufficient to justify an award of attorneys' fees was never before this Court. Assuming for the sake of argument that it was before us and that we found bad faith, whether or not to award attorneys' fees was still within the District Court's discretion, and we do not think that discretion was abused here.

With respect to the prejudgment interest, the plaintiffs argue that the District Court abused its discretion by denying it since, they claim, it is ordinarily granted absent bad faith, dilatoriness, or the assertion of frivolous claims on the part of the plaintiff. Plaintiffs have misstated the proper legal standard. Like attorneys' fees, an award of prejudgment interest is within the discretion of the trial judge; it is never automatic. We see no evidence here that the District Court abused its discretion.

V.

Finally, the plaintiffs argue that the District Court erred in computing damages by not including in its calculations overtime pay, vacation pay, pension contributions, earned work credit payments, health-insurance benefits, and life-insurance benefits. The plaintiffs did not, however, document any specific health or life-insurance benefits that should have been paid during the three-month period but were not. In fact, they did not request any specific amount at all. We have thoroughly searched the record for discrepancies, but have found nothing to cause us to believe the calculation by the District Court was clearly erroneous. In fact, the Court awarded most of the plaintiffs more than their own calculations for the second quarter of 1983 – including overtime pay, health and life-insurance benefits, and vacation pay – indicated was appropriate. Additionally, none of the plaintiffs claimed that medical expenses or life-insurance benefits were even owed for the months of March through June of 1983. The District Court was also correct not to include an amount for pension contributions. Metz makes a contribution in a good year only. A good year means that the employee worked at least 1800 hours that year. None of the plaintiffs would have accumulated 1800 hours by mid-June. In conclusion, we are not persuaded that the District Court's calculation of damages is clearly erroneous.

IV. (sic)

In light of our decision, it is unnecessary to address the arguments of the intervenors. Our affirmance on the

merits of the main appeal necessarily means that plaintiffs have no seniority rights superior to those of the intervening group of Metz employees.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, v. BAKERY, CONFECTIONERY AND TOBACCO WORKERS, UNION LOCAL #433, et al., Defendants.	CV. 83-0-652 MEMORADUM OPINION (Filed Oct. 11, 1991)

I. FINDINGS OF FACT

A. This matter is before the Court on remand from the Eighth Circuit Court of Appeals for determination of damages. Jurisdiction is premised upon Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185).

B. PARTIES

Plaintiffs are individuals and former employees of Interstate Brands Corporation (hereinafter "IBC") who were subsequently, for varying time periods, employees of Metz Baking Company (hereinafter "Metz"), an Iowa corporation which at all times hereto operated one or more bakery facilities in Nebraska. Defendant Bakery, Confectionery & Tobacco Workers Union Local 433 (hereinafter "Union") is a labor organization under the

National Labor Relations Act. "Intervenors" are current employees of Metz.

C. BACKGROUND

The rather tortured history of this matter involves two separate arbitration hearings, two trials involving three federal district court judges, an appeal to the United States Court of Appeals for the Eighth Circuit and a petition for writ of certiorari to the United States Supreme Court which was denied, *Metz v. Bakery, Confectionery & Tobacco Workers, Union Local* #433, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988). This eight-year saga began on February 19, 1983, when Metz purchased the Omaha assets of IBC pursuant to an agreement dated February 19, 1983. The two companies had been competitors in the Omaha area bread market, each with its own bakery, routes, and employees. Under the purchase agreement (Exhibit 74c, § 10), Metz became the successor employer of the IBC employees. IBC had forty-one (41) full-time employees at the time of the sale; Metz had seventy-eight (78) (Exhibit 74e at 2).

With its purchase of IBC, Metz found itself with two bakeries and two work forces in one market. Both sets of employees were represented by the Union, and both Metz and IBC had operated under a jointly executed collective bargaining agreement with the Union. That agreement made no express provision for merging separate work forces in the event of a corporate merger. Metz and the Union did not negotiate on this issue; any proposals resulting from such negotiation would have required modification of the collective bargaining agreement and

would have been subject to ratification by Union members in the two facilities.

Metz initially kept all employees of both plants on its payroll, although it "end-tailed" the former IBC employees, treating them as "new hires," with a seniority date of February 19, 1983.[1] Metz' intent at the time of purchase had been to operate both bakeries for a period of at least six to eight (6 to 8) weeks in order to retain as much of the former IBC business as possible. However, the transition went more quickly than anticipated, and in two weeks, Metz consolidated operations in one plant. Because it considered the former IBC bakery – the "Leavenworth" facility – more modern and efficient, Metz decided to keep that one open and to close its own former bakery – the "Nicholas" facility. In early March, 1983, Metz moved its own employees into the Leavenworth facility and began laying of the former IBC employees (hereinafter "plaintiffs").

On or about March 4, 1983, plaintiffs filed a grievance (Exhibit 74h) in which they alleged that the seniority provisions of their contract were unfairly and improperly implemented by Metz. They sought to have their jobs restored in accordance with their seniority and to be awarded backpay. The Union, contending that it had a duty to represent both groups, opted to stay neutral with regard to the grievance. Arbitration was held on April 26, 1983, and on June 7, 1983, Arbitrator James A. Doyle

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[1] The evidence is clear that if Metz had chosen to "dovetail" the two sets of employees, *e.g.* to merge the seniority lists on the basis of time with either employer, the result would have been disproportionately in favor of the former IBC employees.

entered his decision in favor of Metz and against the former IBC employees (Exhibit 74e, hereinafter designated as "Doyle No. 1").[2] On September 9, 1983, plaintiffs filed the suit that is the nucleus of the present case, alleging that the Union had violated its duty of fair representation with respect to both negotiation and the arbitration, and alleging that Metz had violated the terms of the collective bargaining agreement covering the IBC workers.

While that suit was pending, plaintiffs filed a second grievance on October 6, 1983, dealing solely with the issue of their right to severance pay. On December 15, 1983, Arbitrator Doyle entered a decision awarding severance pay to thirty-seven (37) of the plaintiffs (Exhibit 301, hereinafter "Doyle No. 2"). When Metz demanded that the successful grievants sign a "Release and Receipt" before they could receive their severance pay, those grievants filed suit in federal court (CV. 83-O-560). On May 16, 1985, a hearing was held before Senior Judge Richard E. Robinson. From the transcript of that hearing (Exhibit 103c) and Judge Robinson's opinion (Exhibit 103d), it is clear all parties and the Court agreed that the sole purpose of the receipt was to acknowledge payment for whatever sums these plaintiffs were entitled to receive under the collective bargaining agreement between IBC and the Union, and that signing the receipt would have no effect on future rights of the signers with regard to the

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[2] Because that arbitration decision was ultimately held by the jury to be invalid due to the Union's breach of its duty of fair representation, that decision is not binding on the parties to this dispute.

pending companion case (ultimately the case now before this Court).

In the meantime, plaintiffs' suit with regard to Doyle No. 1 came to trial before The Honorable C. Arlen Beam in a bifurcated jury trial. On July 16, 1986, the jury returned a verdict in favor of plaintiffs on the liability phase of the trial (Filing No. 49, Exhibit No. 72). On August 13, 1985, Judge Beam granted motions for judgment notwithstanding the verdict in favor of both the Union and Metz (Filing No. 77). The plaintiffs filed a timely appeal and on August 17, 1987, the Eighth Circuit Court of Appeals reversed, and remanded for determination of appropriate remedies. *Thomas v. Bakery, Confectionery, and Tobacco Workers Union Local 433*, 826 F.2d 755 (8th Cir. 1987).

On March 7, 1988, the United States Supreme Court denied Writs of Certiorari on behalf of both Metz and the Union. On November 8, 1988, several Metz employees were permitted to intervene in the case, "tak[ing] the case as they find it as of the date of this order" (Filing No. 117). Trial was begun before The Honorable William G. Cambridge on October 16, 1990, but was continued when Judge Cambridge recused himself, and the case was reassigned to this Court. The instant trial began on April 29, 1991, and concluded on June 20, 1991, when the parties presented their closing arguments.

II. CONCLUSIONS OF LAW

A. THE FRAMEWORK FOR ANALYSIS

The legal analysis by this Court is of necessity framed by the jury findings in the previous trial and by the Eighth Circuit Court of Appeals instructions on remand.

As noted above, the trial jury in the first phase of a bifurcated trial found for the plaintiffs against both defendants. Specifically, the jury found, by special verdict: (1) that the Union had breached its duty of fair representation to the plaintiffs (Exhibit No. 72, Questions 1 and 3); (2) that the Union's failure to negotiate had resulted in the plaintiffs being laid off in March of 1983 (Exhibit No. 72, Question 2); (3) that the Union's conduct had tainted the arbitration proceeding (Exhibit No. 72, Question 4); (4) that Metz had assumed and subsequently breached contractual seniority obligations to the plaintiffs (Exhibit No. 72, Questions 5, 6, and 7); and (5) that the plaintiffs were laid off as a result of Metz' breach of that agreement (Exhibit No. 72, Question 8).

Those jury findings were set aside by Judge C. Arlen Beam, who entered judgment notwithstanding the verdict. Specifically, Judge Beam held that (1) because the jury found that Metz had agreed to assume plaintiffs' IBC seniority rights, the Union had no duty of fair representation other than to facilitate the arbitration proceeding that was in fact held; (2) that the Union had no knowledge of the impending layoffs before they began, and hence no duty to represent the plaintiffs before that time; and (3) that negotiation was ultimately unnecessary, because the

Metz employees, who significantly outnumbered the former IBC employees, would necessarily have voted in favor or their own economic self-interest in ratifying any negotiated solution (Filing No. 79).

The Eighth Circuit Court of Appeals subsequently reinstated the jury's finding of liability and remanded for determination of appropriate remedies. The Court of Appeals first found that sufficient evidence had been adduced to support the jury's findings that the Union had known prior to the layoffs of a threat to plaintiffs' seniority rights under the terms of the IBC-Metz purchase agreement and had nonetheless failed to represent the plaintiffs. *Thomas,* 826 F.2d at 759.

The Court of Appeals next rejected the District Court's conclusion that negotiations would necessarily have been futile and that the failure to negotiate therefore could not support an allegation of a breach of the duty of fair representation. The appellate court first reasoned that the futility argument goes to the issue of remedy, not breach of duty. *Id.* at 759-60. Then, in a footnote that this Court finds is central to the resolution of this matter, the Eighth Circuit directed that

> [t]he District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that *would have been feasible,* and this will help the Court to determine *what would have occurred but for the Union's failure to negotiate. Plaintiffs will bear the burden of proof,* and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely

> a declaratory judgment and perhaps nominal damages.

Id. at 760, n.1 (emphasis added). In other words, in determining the appropriate remedy, plaintiffs bear the burden of proving what loss, if any, they would have suffered even if the Union and Metz had properly handled the merger of the work forces.

B. APPLYING FOOTNOTE 1

"Negotiating seniority provisions is a duty uniquely within the province of the bargaining agent. The Union is free to renegotiate seniority provisions [subject only] to its obligation to treat all members fairly." *Papcin v. Dichello Distributors, Inc.*, 697 F.Supp. 73, 80 (D.Conn. 1988), *aff'd*, 862 F.2d 304 (2d Cir. 1988). *See also King v. Space Carriers, Inc.*, 608 F.2d 283 (8th Cir. 1979) (upholding Union's right to negotiate dovetailing agreement). It would have been possible for Metz and the Union to have negotiated a solution to the post-merger seniority problem and proposed it to the Union membership for ratification. If the collective bargaining agreement had been modified, then there could not have been a grievance based on breach of contract and, therefore, no need for arbitration.

Accordingly, the task facing this Court is to determine, to the extent possible, how the seniority rights of all post-merger Metz employees, including those of the former IBC employees, would have been modified had the Union and Metz negotiated the merger. Such negotiated changes would have to be ratified by a majority vote of the eligible membership (Exhibit 65, "By-Laws of Local

433," Article XI, § 1). The burden was on the plaintiffs to show that such contractual changes would not have been ratified, and it is clear from the evidence presented at trial that they could not and did not carry that burden.

While one collective bargaining agreement had been negotiated between the Union and Metz, IBC and ITT Continental Baking Company, Inc. (Exhibit 302), the Court of Appeals held that while "there was only one written contract, the words of that contract represented *separate labor agreements* running between each employer and the *individual bargaining units* of that employer's workers." 826 F.2d at 757 (emphasis added). The Collective bargaining Agreement (Exhibit 302) contains no provisions regarding procedures to amend or modify its terms. While Article XI of the By-Laws of Local # 433 (Exhibit 65) doesn't speak to amendment of existing agreements, it seems clear to the Court that any amendments to the seniority provisions of Exhibit 302 would result effectively in a new agreement and would require submission to the numbers for their approval or ratification. Article XI, Section 2 states: "All basic agreements covering wages, hours, and working conditions will be *subject to the approval of a majority of the members covered by such agreement.*" (Emphasis added). Clearly the membership entitled to vote would be the employees of Metz and IBC only as it was their respective contracts which would be modified.

Although the exact numbers are in dispute, it is undisputed that, at the time of the merger of the two work forces in early March, the number of Metz employees eligible to vote significantly outnumbered the

number of former IBC employees who could have voted.[3] By stipulation, Metz introduced seventy-nine (79) affidavits from the Metz employees (Exhibit 101), supported by trial testimony, in which each stated unequivocally that he or she would have voted to end-tail the former IBC employees. Had such a proposal been presented for ratification, it is clear that the collective bargaining agreement would have been modified, and the former IBC employees would have been legally end-tailed. In such a situation, arbitration would not have been required, and no breach of contract or of a duty of fair representation could have occurred. Damages to which plaintiffs are entitled, if any, are therefore limited to the time period before which they could have been legally laid off. *Cf. Westland v. Sero of New Haven*, 601 F.Supp. 163, 167 (N.D. Ill. 1985) (plaintiff's damages for lost commissions "stop at the date he *could* have been rightfully terminated") (emphasis in original).

C. THE REMEDY

Although plaintiffs cannot prove they would have suffered any loss after the collective bargaining agreement would have been modified and, therefore, are not entitled to any remedy after that date, the jury specifically found that they would not have lost their full-time positions had Metz and the Union complied with the collective bargaining agreement as it existed at the time of the layoffs. The necessary conclusion, therefore, is that

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[3] Estimates of eligible continuing Metz employees range from eighty-nine to ninety-two (89 to 92) and of former IBC employees from forty-nine to sixty (49 to 60).

plaintiffs would have had their jobs until the collective bargaining agreement was modified and were wrongfully denied the income they would have earned under the existing agreement.

Accordingly, plaintiffs are entitled to recover for the loss they suffered during the time it would have taken to negotiate and ratify the necessary changes in the collective bargaining agreement. Under the then-applicable by-laws of the Union, any change to a basic agreement must be considered "at a regular meeting or at a special meeting called for this purpose." (Exhibit 65, Article XI, § 1). No specific time frame is set out, but the evidence suggests that it would have taken approximately three months to negotiate, propose and ratify the modification to the collective bargaining agreement. Accordingly, the Court finds each plaintiff will be entitled to recover the income she or he would have earned from Metz during such period, reduced by the income earned, if any, from employment at Metz or elsewhere during that same time period.

The severance pay received by thirty-seven (37) of the plaintiffs pursuant to the Doyle No. 2 arbitration and award will not serve to reduce recovery by any plaintiff. Those funds were payment for past services to IBC. *See* 51 C.J.S. *Labor Relations* § 254 (1967): "Severance pay in a collective bargaining agreement is terminal compensation measured by the service given during the subsistence of the contract." Those funds therefore do not constitute a set-off for any breach by Metz of the contractual obligation it assumed when it purchased the assets of IBC.

The seniority grievance was delivered to the Union on or about March 4, 1983 (Exhibit 74h) and was forwarded to the Company by the Union's attorney on or about March 7, 1983. The modification of the collective bargaining agreement would have then been concluded some time in June of 1983. Balancing the interests of the parties and finding that the plaintiffs have sustained damage, it is now the duty of the Court to ascertain on behalf of each plaintiff the amount of that damage. The parties at the commencement of the trial, and pursuant to the urging of the Court, tried to work out the terms of a stipulation to deal with the income which each plaintiff would have received, together with the amount of earnings they realized from other sources during the period after March 21, 1983, when nearly all of them had been laid off. The plaintiffs calculated these amounts on a quarterly basis. The defendants have stipulated that the figures used by the plaintiffs are correct and that the amounts which would have been realized on a quarterly basis as set forth in the stipulation are correct but have taken issue with that as being an appropriate way of approaching the calculation of damages. Balancing the interests of the parties, the Court finds that damages should be awarded through June 15, 1983. Accordingly, the Court finds that the plaintiffs separately have sustained damages in the loss of income. The income loss would be the contract wages due from Metz for the period through June 15, 1983, plus holiday pay, less interim earnings. These amounts for each plaintiff are as follows:

1983: 1st and 2nd Quarters

Lloyd Anderson:	Contract plus Holiday	$4,738.72
	Interim	3,789.41
	Lost Income	949.31
David Bell:	Contract plus Holiday	4,786.24
	Interim	4,516.74
	Lost Income	269.50
Dale Burk:	Contract plus Holiday	4,786.24
	Interim	3,782.70
	Lost Income	1,003.54
Dennis Canterbury:	Contract plus Holiday	5,596.00
	Interim	282.04
	Lost Income	5,313.96
Gerald Carew:	Contract plus Holiday	5,596.00
	Interim	178.72
	Lost Income	5,417.28
John Conner:	Contract plus Holiday	5,310.24
	Interim	3,513.80
	Lost Income	1,796.44
Curtis Cotton:	Contract plus Holiday	4,744.00
	Interim	3,301.15
	Lost Income	1,442.85
Michael DeJanes: (sic)	Contract plus Holiday	5,444.00
	Interim	3,174.67
	Lost Income	2,269.33
Ressie Estell:	Contract plus Holiday	5,310.24
	Interim	210.59
	Lost Income	5,099.65
Robert Fillbach:	Contract plus Holiday	4,627.84
	Interim	1,625.57
	Lost Income	3,002.27

Paul Flower:	Contract plus Holiday	4,786.24
	Interim	3,857.83
	Lost Income	928.41
David Foster:	Contract plus Holiday	5,310.24
	Interim	138.07
	Lost Income	5,172.17
Donald Froien:	Contract plus Holiday	5,492.64
	Interim	- 0 -
	Lost Income	5,492.64
James George:	Contract plus Holiday	5,444.00
	Interim	528.60
	Lost Income	4,915.40
Eddie Gill:	Contract plus Holiday	5,310.24
	Interim	426.75
	Lost Income	4,883.49
Thomas Hayden:	Contract plus Holiday	5,383.20
	Interim	3,136.43
	Lost Income	2,246.77
Ivan Heesacker:	Contract plus Holiday	5,310.24
	Interim	2,903.96
	Lost Income	2,406.28
Robert Hinsley:	Contract plus Holiday	4,738.72
	Interim	3,468.97
	Lost Income	1,269.75
Lewis Huston:	Contract plus Holiday	4,786.24
	Interim	4,425.35
	Lost Income	360.89
Josephine James:	Contract plus Holiday	5,310.24
	Interim	3,666.07
	Lost Income	1,644.17
Calvin Jewett:	Contract plus Holiday	5,444.00
	Interim	3,537.70
	Lost Income	1,906.30

Ralph Johnson:	Contract plus Holiday	4,786.24
	Interim	3,410.33
	Lost Income	1,375.91
Kent Jorgensen:	Contract plus Holiday	5,379.04
	Interim	2,766.52
	Lost Income	2,612.52
Patricia Livengood:	Contract plus Holiday	5,310.24
	Interim	1,843.52
	Lost Income	3,466.72
William Marsh:	Contract plus Holiday	5,596.00
	Interim	655.00
	Lost Income	4,941.00
Clyde Moore:	Contract plus Holiday	4,627.84
	Interim	4,225.69
	Lost Income	402.15
Percy Moore:	Contract plus Holiday	4,738.72
	Interim	4,222.21
	Lost Income	516.51
James Nash:	Contract plus Holiday	4,627.84
	Interim	3,504.24
	Lost Income	1,123.60
Robert Peters:	Contract plus Holiday	4,691.20
	Interim	3,295.81
	Lost Income	1,395.39
John Pittman:	Contract plus Holiday	5,437.92
	Interim	2,430.57
	Lost Income	3,007.35
Sylvio Rebolloso:	Contract plus Holiday	4,691.20
	Interim	3,589.97
	Lost Income	1,101.23

Jane Reed:	Contract plus Holiday	5,437.92
	Interim	4,504.18
	Lost Income	933.74
Wayne Shaffar:	Contract plus Holiday	5,492.64
	Interim	489.03
	Lost Income	5,003.61
Paul Stone:	Contract plus Holiday	5,437.92
	Interim	3,391.33
	Lost Income	2,046.59
Selman (Joe) Thomas, Jr.:	Contract plus Holiday	5,310.24
	Interim	3,846.04
	Lost Income	1,464.20
James Thompson:	Contract plus Holiday	4,738.72
	Interim	4,224.06
	Lost Income	514.66
Melvin Wade, Jr.:	Contract plus Holiday	5,492.64
	Interim	1,446.53
	Lost Income	4,046.11
James Walker:	Contract plus Holiday	5,310.24
	Interim	114.16
	Lost Income	5,196.08
Clayton Welch:	Contract plus Holiday	4,738.72
	Interim	3,093.73
	Lost Income	1,644.99
Ishanwee Wrenn:	Contract plus Holiday	5,310.24
	Interim	164.43
	Lost Income	5,145.81

D. THE COURT SHOULD CONSIDER THE UNION'S ABILITY TO PAY.

The Union argues that public labor policy precludes imposition of damages on it that would impair its ability to represent its members and that its financial condition is therefore a relevant consideration. However, the cases upon which the Union relies, *e.g., Bowen v. United States Postal Service*, 459 U.S. 228 (1983), and *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), are inapposite in that both are concerned with the impact of *punitive* damages, which are not a factor in the instant case. *See Foust*, 442 U.S. at 50-52:

> This limitation on union liability [for breach of the duty of fair representation] reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds. To permit *punitive* damages, which, by definition, provide monetary relief in excess of actual loss, could undermine this careful accommodation [since] the impact of these windfall recoveries is unpredictable and potentially substantial. . . . Because general labor policy disfavors punishment, and the adverse consequences of *punitive damages awards* could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation.

(Citation omitted, emphasis added). *See Bowen*, 459 U.S. at 228 n.16 n.16 (upholding an award of compensatory

damages against the union and reiterating the *Foust* proscription against *punitive* damages). The financial condition of defendant Union is therefore not relevant to this Court's determination of damages.

E. LIABILITY IS JOINT AND SEVERAL

Although damages are ordinarily apportioned in § 301 cases, *see, e.g., Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967), that policy is premised upon independent breaches by each party. *See Vaca*, 386 U.S. at 197 n.1 ("Since the union played no part in [employer]'s alleged breach of contract and since [employer] took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted"); *see also Bowen*, 459 U.S. at 223 n. 11 (1983) (In discussing the usual allocation of damages in section 301 actions, the Court noted that "this is not a situation in which either the union or employer has participated in the other's breach").

By contrast, the instant case is one in which both defendants bear equal responsibility. The jury expressly found that Metz and the Union caused plaintiffs to be wrongfully laid off, the Union by failing to negotiate the merger and Metz by breaching the contractual obligations it had assumed. Accordingly, "this case presents the unusual situation in which an employer has participated in the union's breach of duty, [and] joint and several liability is warranted." *Allen v. Allied Plant Maintenance Company*, 881 F.2d 291, 299 (6th Cir. 1989).

F. ATTORNEYS' FEES

Under the "American Rule," a prevailing party may recover attorneys' fees only when authorized by statute, except in certain recognized and limited exceptions. *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240 (1975). Title 29, U.S.C. § 185 does not authorize such an award, *Actors Equity Association v. American Dinner Theatre Institute*, 802 F.2d 1038, 1043 (8th Cir. 1986), and an award of fees in a case brought pursuant to it may be made "only where the losing party clearly acted in bad faith." *Id.* at 1042. The Court further stated: "In this Court's view, bad faith would be evidenced in the present case by a showing that the appellants intentionally advanced a frivolous contention for an ulterior purpose, such as harassment or delay." *Id.* at 1043.

A finding of bad faith is a factual determination for the trial court, *id.*, and is generally warranted only if losing party's claim was "frivolous, unreasonable, or groundless, or where the party continued to litigate after it clearly became so." *Id.; Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). There is no evidence of such conduct by defendants in the instant case.

Plaintiffs argue that they should be allowed to recover the attorney fees as an element of damages, not as fees per se. Although other circuits have allowed such recovery, *see e.g. Scott v. Local Union 377, International Brotherhood of Teamsters, etc.*, 548 F.2d 1244, 1246 (6th Cir. 1977), the Eighth Circuit has expressly held that attorneys' fees may not be considered as compensatory damages. *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978) ("Attorney's fees incurred in bringing a § 301

action do not rise to the status of compensatory damages"). Attorneys' fees will not be awarded. An order in accordance with this opinion will be entered this date.

DATED this 11th day of October, 1991.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, v. BAKERY, CONFECTIONERY AND TOBACCO WORKERS, UNION LOCAL # 433, et al., Defendants.	CV. 83-0-652 ORDER AND JUDGMENT (Filed Oct. 11, 1991)

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Judgment is entered in favor of plaintiffs and against defendants, jointly and severally, in the total amount of $103,728.57, together with taxable costs, and plaintiffs shall recover as follows:

Lloyd Anderson:	$ 949.31
David Bell:	269.50
Dale Burk:	1,003.54
Dennis Canterbury:	5,313.96
Gerald Carew:	5,417.28
John Conner:	1,796.44
Curtis Cotton:	1,442.85
Michael DeJanes: (sic)	2,269.33
Ressie Estell:	5,099.65
Robert Fillbach:	3,002.27
Paul Flower:	928.41

David Foster:	5,172.17
Donald Froien:	5,492.64
James George:	4,915.40
Eddie Gill:	4,883.49
Thomas Hayden:	2,246.77
Ivan Heesacker:	2,406.28
Robert Hinsley:	1,269.75
Lewis Huston:	360.89
Josephine James:	1,644.17
Calvin Jewett:	1,906.30
Ralph Johnson:	1,375.91
Kent Jorgensen:	2,612.52
Patricia Livengood:	3,466.72
William Marsh:	4,941.00
Clyde Moore:	402.15
Percy Moore:	516.51
James Nash:	1,123.60
Robert Peters:	1,395.39
John Pittman:	3,007.35
Sylvio Rebolloso:	1,101.23
Jane Reed:	933.74
Wayne Shaffar:	5,003.61
Paul Stone:	2,046.59
Selman (Joe) Thomas, Jr.:	1,464.20
James Thompson:	514.66
Melvin Wade, Jr.:	4,046.11
James Walker:	5,196.08
Clayton Welch:	1,644.99
Ishanwee Wrenn:	5,145.81

2) Plaintiffs' application for attorney fees (Filing No. 527) is denied. No prejudgment interest is awarded.

DATED this 11th day of October, 1991.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, v. BAKERY, CONFECTIONERY AND TOBACCO WORKERS, UNION LOCAL # 433, et al., Defendants.	CV. 83-0-652 ORDER AND JUDGMENT (Filed Feb. 24, 1992)

Pursuant to the order of remand from the United States Court of Appeals for the Eighth Circuit, the Court scheduled a hearing for January 29, 1992. The parties advised the Court that no further evidence nor arguments would be presented to the Court. Accordingly, pursuant to the memorandum opinion entered herein,

IT IS ORDERED:

1) Judgment is entered in favor of plaintiffs and against defendants, Bakery, Confectionery and Tobacco Workers Union, Local #433, and Metz Baking Company, jointly and severally, in the total amount of $103,728.57, together with taxable costs, and plaintiffs shall recover as follows:

Lloyd Anderson:	$ 949.31
David Bell:	269.50
Dale Burk:	1,003.54
Dennis Canterbury:	5,313.96

Gerald Carew:	5,417.28
John Conner:	1,796.44
Curtis Cotton:	1,442.85
Michael DeJanes: (sic)	2,269.33
Ressie Estell:	5,099.65
Robert Fillbach:	3,002.27
Paul Flower:	928.41
David Foster:	5,172.17
Donald Froien:	5,492.64
James George:	4,915.40
Eddie Gill:	4,883.49
Thomas Hayden:	2,246.77
Ivan Heesacker:	2,406.28
Robert Hinsley:	1,269.75
Lewis Huston:	360.89
Josephine James:	1,644.17
Calvin Jewett:	1,906.30
Ralph Johnson:	1,375.91
Kent Jorgensen:	2,612.52
Patricia Livengood:	3,466.72
William Marsh:	4,941.00
Clyde Moore:	402.15
Percy Moore:	516.51
James Nash:	1,123.60
Robert Peters:	1,395.39
John Pittman:	3,007.35
Sylvio Rebolloso:	1,101.23
Jane Reed:	933.74
Wayne Shaffar:	5,003.61
Paul Stone:	2,046.59
Selman (Joe) Thomas, Jr.:	1,464.20
James Thompson:	514.66
Melvin Wade, Jr.:	4,046.11
James Walker:	5,196.08
Clayton Welch:	1,644.99
Ishanwee Wrenn:	5,145.81

2) Plaintiffs's (sic) application for attorney fees (Filing No. 527) is denied. No prejudgment interest is awarded.

3) Intervenors are dismissed as parties to this action.

DATED this 24th day of February, 1992.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

APPENDIX E

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-2214

Selman (Joe) Thomas, Jr.; Lloyd Anderson; David Bell; Dale John Burk; Dennis Canterbury; John Conner; Curtis Cotton; Michael DeJaynes; Bessie (sic) Estell; Mary Louis Fillbach (sic); Paul Flower; David Foster; Donald Froien; James George; Eddie Gill; Ivan Heesacker; Robert Hinsley; Lewis Huston; Josephine James; Calvin Jewett; Ralph Johnson; Kent Jorgensen; Patricia Livengood, William Marsh; Clyde Moore; Percy Moore; James Nash; Robert Peters; John Pittman; Sylvio Rebolloso; Jane Reed; Wayne Shaffar; Paul Stone; James Thompson; James Walker; Clayton Welch; Ishanwee Wrenn; Gerald Carew; Thomas Hayden; and Melvin Wade, Jr., Appellants, v. Bakery, Confectionery and Tobacco Workers Union Local #433 and Metz Baking Company, Appellees.	On Appeal from the United States District Court for the District of Nebraska.

Submitted: May 15, 1987
Filed: August 17, 1987

Before ARNOLD, Circuit Judge, WRIGHT* and HENLEY, Senior Circuit Judges.

ARNOLD, Circuit Judge.

In this action, plaintiffs are former employees of Interstate Brands Corporation ("IBC"), a bakery. In February 1983, defendant Metz Baking Company, a competitor of IBC, bought most of IBC's assets, including the plant on Leavenworth Street in Omaha, Nebraska, where plaintiffs worked. After the sale, Metz employed plaintiffs at the Leavenworth bakery for two weeks, until it closed down the other bakery it operated in Omaha, on Nicholas Street, and transferred the Nicholas Street employees (who were represented by the same union that represented the former IBC employees, defendant Local No. 433 of the Bakery, Confectionery, and Tobacco Workers Union) to the Leavenworth plant. Metz then "end-tailed" the former IBC employees, which means it placed them at the bottom of the plant-wide seniority list, after most of the Nicholas Street employees, for purposes of lay-offs. Of course, since Metz had two full complements of employees assigned to the Leavenworth plant after the transfers, lay-offs were immediately necessary, and the plaintiffs were laid off.

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* The Hon. Eugene A. Wright, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

After unsuccessfully taking their lay-offs to arbitration, plaintiffs sued the Union for violating its duty of fair representation and Metz for breaking the collective-bargaining agreement it had with plaintiffs. The trial was bifurcated. The question of liability was first submitted to the jury on special interrogatories, with the idea that relief would be determined at a later stage of the case if the jury should find defendants liable. The jury did find in favor of plaintiffs, but the District Court granted judgment n.o.v. for defendants and, in the alternative, denied defendants' motion for a new trial. Plaintiffs appeal the judgment n.o.v., and defendants claim error in the denial of their alternative motion for a new trial. We hold that the District Court erred in granting judgment n.o.v. but was correct in denying the new trial; therefore we direct that judgment be entered on the jury's verdict, and remand for determination of appropriate remedies.

I.

The Union represented both groups of employees involved here, as well as other bakery workers, and it had negotiated a single collective-bargaining agreement, on behalf of all its members, with IBC, Metz, and another baking company. But although there was only one written contract, the words of that contract represented separate labor agreements running between each employer and the individual bargaining units of that employer's workers. And each separate plant comprised an independent bargaining unit. Thus, before Metz bought IBC's assets, there was one agreement governing labor relations between IBC and its Leavenworth employees, and

another between Metz and its Nicholas employees, and the terms of the two agreements were identical.

The labor agreement, in effect from May 2, 1982, until May 5, 1985, provided in part:

> ARTICLE X
>
> SENIORITY
>
> * * * *
>
> Section 4. In the event it becomes necessary to reduce the working force for the lack of business or other legitimate reasons, the last person hired in the plant shall be the first person laid off. . . .

P. Ex. 2, at 3-4. The agreement also stated: "This Agreement and the provisions herein contained shall be binding upon the parties hereto, their heirs, successors or assigns." *Id.* at 18.

In February 1983, when Metz agreed to buy IBC's assets, Metz and IBC recorded their agreement in a lengthy purchase contract. Among the assets that IBC agreed to transfer to Metz were:

> [Section 1.1] (c) All of the rights of [IBC] in, to and under the contracts and commitments described in Exhibit D hereto; provided, however, that such contracts and commitments shall be assigned to [Metz] subject to all of the terms thereof. . . .

P. Ex. 1, at 2. Exhibit D to the purchase agreement described the collective-bargaining agreement between IBC and its Leavenworth employees. In turn, Metz agreed to

> [Section 3.1] (c) the assumption by [Metz] of the liabilities and obligations of [IBC] under the realty leases, contracts and commitments referred to in Sections 1.1 (b) and (c) hereof.

Id. at 5. Metz and IBC also agreed that payment of the purchase price would be made in part

> [Section 3.2] (b) by the delivery to [IBC] of a written undertaking . . . whereby [Metz] agrees to assume, pay, perform, satisfy and discharge the unfulfilled portion . . . of any and all duties, obligations and liabilities of [IBC] under the realty leases, contracts and commitments identified in Exhibits C and D hereto[.]

Ibid.

In addition to these provisions regarding the rights and duties that Metz would assume from IBC, the purchase agreement also provided for the "transfer" of employees from IBC to Metz.

> Section 10. Transferred Employees.
>
> 10.1 All of Seller's employees who are primarily engaged in the conduct of the Subject Operations as the Transfer Date shall become employees of Buyer on the Transfer Date (the "Transferred Employees"), and Buyer shall become the successor employer under, and shall use its best efforts to obtain novations with respect to, each of the collective bargaining agreements identified in Exhibit D hereto. Seller agrees to make full and final settlement with the Transferred Employees, as of the Transfer Date, with respect to wages, salaries, union dues, contributions to welfare and employee benefit plans, payroll taxes, premium pay and all other obligations relating to their employment by

> Seller, to and including the Transfer Date, except for the accrued vacation rights, if any, of the Transferred Employees, which rights Buyer agrees to recognize and honor subsequent to the Transfer Date, and except for contingent work week credits not yet due and payable.
>
> * * * *
>
> 10.3 Notwithstanding the foregoing, in the event that any claim is made against Seller, by reason of Seller having been a party to any of the collective bargaining agreements identified in Exhibit D hereto, or for severance or termination pay under or pursuant to any of said agreements by reason of the transfer of any employees to Buyer, the termination of any of the Transferred Employees by Buyer or the termination of any employees by Seller at the request of Buyer, Buyer shall indemnify and save Seller harmless from and against all such claims, including all costs and expenses of defending against any such claims and any and all liabilities arising therefrom. Nothing contained herein shall be deemed or construed to require Buyer to continue to employ any of the Transferred Employees during any period following the Transfer Date.

Id. at 13-14.

When Metz closed the purchase on February 19, 1983, it took on the former IBC employees and treated them as "new hires" as of that date, which destroyed their previous seniority with IBC and made them junior to all of Metz's Nicholas Street employees who had been hired before then. Plaintiffs' claim against Metz rests on the effect of the purchase agreement: If Metz agreed to

assume IBC's duties under the IBC-Leavenworth Street labor contract, then Metz was obliged to recognize the seniority plaintiffs had with IBC, and Metz could not treat them as new hires in February 1983, nor end-tail them to the Nicholas Street workers.

But plaintiffs have already presented this claim in arbitration, and the arbitrator ruled against them. This presents an obstacle to review of plaintiffs' claim in federal court, for plaintiffs are party to a labor contract with Metz (Metz agrees that it assumed IBC's labor agreement with the Leavenworth workers, but argues that this assumption did not include the seniority rights of the former IBC workers), and the labor contract states that claims such as plaintiffs' will be arbitrated, and that the arbitrator's decision will be binding on all the parties. In these circumstances, Metz is entitled to rely on the arbitrator's award as a bar to subsequent litigation of the claim unless the plaintiffs prove that the arbitration "process has fundamentally malfunctioned by reason of the bad-faith performance of the union," *Hines v. Anchor Motor Freight*, 424 U.S. 554, 569 (1976), in which case plaintiffs can avoid the bar. This requires that plaintiffs show that the Union violated its duty of fair representation and that this breach tainted or "seriously undermine[d] the integrity of the arbitral process." *Id.* at 567.

Therefore the immediate focus in this case is to determine whether there was a breach of the duty of fair representation; if not, then the entire case is over, because the Union has no liability and the arbitrator's award must stand. If the duty was violated, then it must be determined whether the breach tainted the arbitration; if not, Metz must win because it will be entitled to rely on the

arbitrator's decision. This was the approach taken by the District Court in its conscientious consideration of the motion for judgment n.o.v., and it ruled that the evidence was insufficient as a matter of law to establish either that the Union violated its fair-representation duty or that any such breach tainted the arbitration, and, accordingly, entered judgment n.o.v. for both defendants without reaching plaintiffs' claim against Metz. To those rulings we now turn.

II.

Plaintiffs alleged that the Union violated the duty of fair representation in two respects: first, by not negotiating with Metz to protect their seniority rights at the time of the sale, and second, by not representing their interests fairly at the arbitration. To establish a violation of the statutory duty of fair representation, plaintiffs must show that the Union was hostile, discriminatory, perfunctory, arbitrary, or dishonest, or acted in bad faith in representing their interests. See *Vaca v. Sipes*, 386 U.S. 171, 188-95 (1967). To hold the Union liable for damages on proof that it was any less culpable would infringe on the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents . . . " *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

A.

On their first theory, plaintiffs produced the testimony of Marlin Lessmann, Metz's general counsel, that he told Bernard Clausen, the president of Local 433,

within one or two days of the purchase that Metz considered plaintiffs to be newly hired as of February 19, 1983. Tr. I:75-76. Clausen denied this. Both testified that Lessmann informed the Union that Metz intended to operate the Leavenworth plant and the Nicholas plant in tandem for a time after the purchase, and Lessmann stated that he told Clausen that there probably would be a consolidation in the near future. Tr. I:91. One plaintiff, James Walker, testified that near the end of February he asked Clausen what was going on in relation to the sale of the Leavenworth plant, and "[Clausen] said we should have – we had our jobs, 'Don't worry,' we had our jobs." Tr. I:181.

Construing this evidence and all reasonable inferences from it in favor of plaintiffs, as we must, the jury could have credited Lessmann's and Walker's testimony and found that Clausen knew that Metz considered plaintiffs to be new hires, and that it contemplated consolidating the two plants, but told one of plaintiffs not to worry about his job. The jury could have inferred from this that Clausen knew that plaintiffs' jobs were at risk, refused to negotiate to protect their interests, and then lied to one of them about their precarious situation. This is sufficient to establish a violation of the fair-representation duty.

The District Court noted this evidence, but held that other evidence and factors made the jury finding unsupportable. First, it found this finding inconsistent with the jury's additional finding that Metz agreed to assume plaintiffs' seniority rights from IBC. If the latter finding is accepted, the reasoning goes, then the Union's only duty under the collective-bargaining agreement was to arbitrate the seniority issue, and the Union discharged this

duty. Therefore there could be no violation of the fair-representation duty.

We disagree with this conclusion. All of the evidence at trial indicated that the Union knew that the purchase agreement existed, but did not know its terms, especially that it contained language of assumption. Thus the language of the purchase agreement played no role in the Union's decision not to negotiate; at most that language was a fortuitous circumstance that relates to what would have happened had it negotiated, not to what actually did occur. There is evidence that supports the inferences that the Local refused to act to protect plaintiffs from a known risk to their seniority and deceived them in the process. This establishes a violation of the fair-representation duty.

The District Court also reasoned that the Union had no reason to know that plaintiffs' seniority was in jeopardy until the lay-offs began in the first week of March 1983, so it had no duty to negotiate before then. But if Lessmann's testimony is accepted, and in this context it must be, then it appears that the Union knew within one or two days of the purchase that Metz would treat plaintiffs as new hires. At that point, it could not refuse to represent plaintiffs' interests.

Finally, the District Court ruled that any negotiated solution would have to have been submitted to a ratification vote by the affected employees, and, since the Nicholas Street employees greatly outnumbered the Leavenworth workers (78 full-time and 33 part-time to 41 full-time and 21 part-time, District Court Ex. 3, at 2), any solution treating the Leavenworth group more favorably

than the other employees would have been defeated. Thus negotiation would have been futile, and the Union should not be held liable for failing to undertake a futile effort. We note first that this argument goes to the issue of the proper remedy, not to whether the Union acted in bad faith in failing to negotiate. And second, assuming that only the Leavenworth and Nicholas Street employees would have voted (we cannot determine from the record who would have had the right to vote,[1] and the parties before us disagree on the issue), it simply does not appear that *any* proposed solution would have favored one or the other group exclusively. Indeed, the most probable compromise, dove-tailing the two groups, would have benefitted the seventy or eighty most senior employees in the two groups, and these would have been a majority of the voters.

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[1] There are different statements in the record. Clausen testified that every Union member in Omaha (a group that included more than just the Metz and former IBC workers) had the right to vote on whether to ratify the general collective-bargaining contract initially. Tr. I:134. Harry Smith, the Local's attorney, testified that only the Leavenworth and Nicholas Street members would have voted on a negotiated solution to Metz's consolidation of operations at the Leavenworth plant, *id.* at 166. The jury was not obliged to believe either of these witnesses. The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine what would have occurred but for the Union's failure to negotiate. Plaintiffs will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely a declaratory judgment and perhaps nominal damages.

In support of the judgment n.o.v., defendants argue that the Union would have breached its duty of fair representation to the Nicholas Street employees if it have negotiated to protect plaintiffs' antagonistic interests. But this overlooks the good-faith element of the duty. There is evidence to support a finding that the Union was dishonest in its representation of plaintiffs. If, however, the Union had in good faith discharged its duty to plaintiffs by negotiating with Metz, it does not follow that it would have represented the Nicholas employees in bad faith. A Union can represent conflicting interests, without fear of violating the fair-representation duty, so long as it does so in good faith. See, *e.g., Ryan v. New York Newspaper Printing Pressmen's Union No. 2*, 590 F.2d 451 (2d Cir. 1979).

Defendants also argue that the evidence was uncontroverted that, had the Union negotiated the seniority issue with Metz before the lay-offs, Metz would have refused to make any concessions and would have laid off the plaintiffs anyway. This, again, is an argument about the appropriate relief, not whether the Union violated its duty. That negotiation would have been futile does not negate the Union's liability for bad-faith failure to negotiate; at most it demonstrates that plaintiffs did not suffer any ascertainable harm as a result of the breach of duty. Whether this is so must be determined at the remedies trial on remand.

B.

The jury also found that the Union violated its fair-representation duty in the way it handled the arbitration.

The evidence on this issue, again construed most favorably for plaintiffs, was that Metz mailed lay-off notices to some of plaintiffs about March 1, 1983, and to the others about a week later. A grievance was filed on about March 4. On March 12, 1983, the Union held a meeting of the general membership of all of its Omaha bargaining units, at which it announced that it would arbitrate the seniority dispute caused by the layoffs, but would remain neutral as between the competing groups. Each group was asked to appoint two representatives to appear at the arbitration.

Plaintiff James Walker testified that he had the following exchange with the Local's president during the March 12 meeting:

Q. What did you ask and who were you asking?

A. Mr. Clausen.

Q. What did you ask?

A. I [asked] him would he have the purchase agreement at our Arbitration Hearing.

Q. Did he respond?

A. Yes. He said he would have it there.

Tr. I:185.

Walker and another plaintiff, William Marsh, were chosen to represent the former IBC employees at the arbitration. On March 19, 1983, they met with several Union representatives, including Harry Smith, the Local's attorney, and Clausen in Sioux City, Iowa, to discuss the arbitration. The representatives of the Nicholas Street

employees met with those officials later that day. The Union advised each group that it could retain independent counsel for the arbitration, and that any member of either group who wanted to testify at the arbitration could do so. At this meeting, no one asked the Union officials whether the purchase agreement would be introduced at the arbitration; Walker testified at trial that he "left that up to the – to the Union man." Tr. I:194.

Smith, the Local's attorney, handled the arbitration. He never asked for or looked at a copy of the purchase agreement before the arbitration. Instead, he telephoned Lessmann after the grievance was filed and, while they discussed the arbitration procedure, Lessmann told him that the transaction was merely a sale of assets, which did not obligate Metz to honor plaintiffs' seniority. Smith accepted Lessmann's description of the contract, and he made no further effort to investigate its terms. He was, however, present at the March 12 meeting when Clausen told Walker that the agreement would be introduced, or at any rate be available, at the arbitration.

At the arbitration, Smith called several employees from each of the competing groups to testify. Aside from these employees, the only other witness at the arbitration was Lessmann, who was called by Smith to testify about the terms of the purchase agreement. Lessmann told the arbitrator that the contract provided for a sale of assets from IBC to Metz, and, while Metz had agreed to maintain certain benefits – other than seniority – that the employees had obtained from IBC, he testified that the contract did not require Metz to assume their seniority. Metz's past practice had been to treat "acquired" employees just as it treated the former IBC workers, as

new hires, and Metz had no intention of changing that practice with the IBC transaction.

The purchase agreement itself was not given to the arbitrator, and there was no suggestion at that hearing that the language of the contract deviated in any way from Lessmann's description, much less that it contained language, in Sections 3.1(c) and 3.2(b), to the effect that Metz agreed to assume IBC's collective-bargaining agreement with plaintiffs *in toto*. The arbitrator's decision reflected this; among his findings of undisputed fact was:

> Third, there was no agreement between the two companies with respect to the status of the [IBC] employees upon the transfer of the assets of that Company to Metz.

P. Ex. 3, at 6.

In addition, Clausen testified at trial that his position from the time of the purchase was that Metz had assumed IBC's collective-bargaining agreement in full and was bound to honor plaintiffs' seniority. He testified that Smith must have known his stance, and he could not explain why Smith took a position contrary to his.[2] Clausen was present at the arbitration, but Smith did not call on him to testify.

On this record, we have no trouble concluding that the jury could have found a violation of the duty of fair representation. The jury could have inferred that Clausen

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[2] In a post-hearing brief, Smith did argue that Metz had assumed the IBC collective-bargaining agreement, but he did not supply a copy of, or quote from, the purchase agreement in support of this argument.

lied when he told Walker that he would have the purchase agreement at the arbitration. The District Court acknowledged that this inference was possible, but ruled that a deception by Clausen could not establish a violation of the fair-representation duty because

> Mr. Walker and the other IBC employees knew the attorney [rather than Clausen] was handling the grievance hearing. Thus, even if the jury found that Mr. Clausen lied to Mr. Walker about the sales contract, that finding does not support the conclusion the Union's attorney treated the IBC employees and their claims dishonestly.

Thomas v. Bakery, Confectionery and Tobacco Workers Union Local #433, No. CV 83-0-652 (D. Neb. Aug. 13, 1986), at 18-19. This analysis misconstrues the legal issue, which is whether the Union, not any one of its officers or agents, acted in complete good faith with regard to plaintiffs' interests. Clausen acted on behalf of the Union, and if he deceived Walker about whether the sales contract would be placed before the arbitrator, that deception is attributable to the Local. And if the Local, through its president, deceived Walker about producing the sales contract at the arbitration, it violated its fair-representation duty regardless of whether the Local's attorney conducted the arbitration in good faith.

Other evidence also supports the jury finding on this issue. Smith, the Local's attorney, did not investigate the terms of the purchase agreement any further than discussing them briefly with Lessmann, who as Metz's general counsel was obviously interested in the outcome of the arbitration. Smith accepted Lessmann's account apparently without question, and that description was

the only evidence of the contract put before the arbitrator. Yet Smith knew that the words of the contract would be material to the dispute if they provided for assumption of plaintiffs' seniority, Tr. I:153-54, and, according to Clausen, Smith must have known the position Clausen took as president of the Local – that Metz had assumed the IBC collective-bargaining agreement *in toto*. In addition, Smith was present at the March 12 meeting when Clausen told Walker that the purchase agreement would be at the arbitration.

This evidence was sufficient for the jury to find at least that Smith was perfunctory in his representation of plaintiffs' interests. The District Court apparently thought so too, but it felt constrained to follow one of our decisions, *Smegal v. Gateway Foods of Minneapolis, Inc.*, 763 F.2d 354 (8th Cir. 1985), *after remand*, 819 F.2d 191 (8th Cir. 1987), which, in its view, required entry of judgment n.o.v. *Smegal* involved a complex series of transactions, including a partial sale of assets, from plaintiffs' former employer to their new employer. One of the agreements provided that the entire transaction was conditioned on the new employer's reaching a satisfactory labor agreement with the union within a short time. The union was unaware of the condition, and negotiated an agreement within the allotted time. Later, after the plaintiff union members discovered the condition, they sued the union on the theory that, had the union investigated the contracts and found the condition, it would have had much greater bargaining power and could have negotiated a labor agreement that would have been much more favorable to them. We held that the union's failure to review the language of the agreements was at most negligence,

and thus insufficient to establish a violation of the duty of fair representation.

This case is distinguishable. In *Smegal* the union had no reason to think that the agreement contained terms favorable to the plaintiffs'; nor was the situation one where the words of the contract between the two employers could have resolved the underlying labor issue: the contract provided only that the transaction was contingent on the purchaser's reaching a satisfactory labor agreement with the union within a certain time. Here, by contrast, the major issue at the arbitration was whether Metz had agreed to assume plaintiffs' seniority rights from IBC. This issue turned primarily on the terms of the contract between Metz and IBC. The Union did argue to the arbitrator that Metz expressly agreed to assume those rights, but the only evidence it produced to support this theory was Metz's interpretation of the agreement, and, of course, it was against Metz's interests to construe the contract to require assumption. Lessmann's testimony gave no indication to the arbitrator that the purchase agreement contained broad language of assumption that supported plaintiffs' theory. In addition, in light of Clausen's belief that Metz had assumed IBC's labor agreement and Walker's request that the Union produce the purchase contract at the arbitration, the Union should at least have requested a copy of it from Metz. The jury could reasonably have found that the Union's failure to make any attempt to obtain or introduce the purchase agreement at the arbitration reduced its representation on the express-assumption theory to a

mere formality, an empty gesture. This is the essence of perfunctory representation.[3]

III.

The District Court held that even if the Union violated the duty of fair representation, the evidence was insufficient to establish that the breach tainted the arbitration, so the arbitrator's decision would bind the parties in any event. See *Hines, supra,* 424 U.S. at 567-72. Even though the only evidence of the purchase agreement before the arbitrator was Lessmann's interpretation of it, the Court reasoned that this was sufficient to inform the arbitrator of the fact of the sale, which was the "essential" fact. Moreover, if the arbitrator thought that the contract terms themselves were essential, he could have requested a copy of the agreement; that he did not

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[3] Plaintiffs argue that since Smith is an attorney, the Union should be held to the standard of conduct of a reasonable attorney in its handling of the arbitration, and any breach of that standard establishes a violation of the duty of fair representation. We have rejected this argument before, see *Curtis v. United Transportation Union,* 700 F.2d 457, 459 (8th Cir. 1983), and we do so again here. A union representative need not be a lawyer and should not be held to a lawyer's standard of care.

Defendants argue, by contrast, that at worst Smith was guilty of mere negligence in not offering the purchase contract in evidence. That kind of default is not sufficiently grave to deserve condemnation as "perfunctory." See *Stevens v. Teamsters Local 600,* 794 F.2d 376 (8th Cir. 1986). Even if this argument is correct, the jury verdict here must still be upheld, because Clausen's deception of Walker could have been found to amount to dishonesty, which constitutes a breach of the duty of fair representation, even if the Union's conduct was otherwise better than perfunctory.

demonstrates that the terms were not essential. Since the arbitrator had all of the essential facts before him, the arbitral process was not tainted.

We disagree. The question for the arbitrator was whether Metz had broken the labor contract, and this turned in part on whether Metz had agreed to assume IBC's labor contract. The most important evidence on this issue was the language of Metz's promise to IBC, for the starting point in any interpretation of an agreement is the contract itself. In addition, we disagree that the fact of the sale was the "essential" fact; on this issue the essential fact was whether Metz promised to assume plaintiffs' seniority rights. And the fact that the arbitrator did not ask for a copy of the contract may indicate only that he had no reason to believe that the contract terms differed from Lessmann's description, not that he deemed the contract unessential.

The jury was within its rights in finding that the absence of the contract "seriously undermine[d] the integrity of the arbitral process." *Hines*, 424 U.S. at 567. The arbitrator had no knowledge of the contract's assumption clause, which was the strongest evidence in support of plaintiffs' legal theory. Without that evidence, plaintiffs' chances of proving express assumption were practically nil, especially in light of Lessmann's testimony. With that evidence, their chances would have been much greater. Thus the failure to present the contract to the arbitrator was a serious flaw in the procedure.

IV.

Metz and the Union argue that, if the judgment n.o.v. in their favor is not to be affirmed, they should at least receive a new trial. The Union claims that the jury instruction on whether the violation of the fair-representation duty tainted the arbitration was erroneous in three respects: (1) it stated the wrong legal standard; (2) it did not adequately define the terms "tainted" and "seriously undermined"; and (3) it violated the policy of finality of arbitral decisions.

The instruction read in part:

> If you find that the plaintiffs have proven . . . that the Union breached its duty of fair representation . . . , then you must . . . determine whether the plaintiffs' interests were prejudiced by the breach. . . .
>
> In order to [prove] that the interests of the plaintiffs were prejudiced by the breach . . . plaintiffs must prove by a preponderance of the evidence that the conduct of the . . . Union tainted, that is seriously undermined, the integrity of the arbitration process.

Designated Record, at 91. This accurately stated the law, *Hines*, 424 U.S. at 567, and we find no error in it. The meaning of the words "tainted" and "seriously undermined" is not beyond the ken of a reasonable juror, so no definition was necessary. And the policy of finality of arbitration decisions was considered and accommodated by the Supreme Court in fashioning this standard. See *id.* at 567-72.

Metz argues that the Court erred in submitting to the jury the question whether the purchase agreement bound Metz to assume IBC's labor obligations. We disagree. While construction of an unambiguous contract is a matter of law for the court, if the language is ambiguous its meaning becomes a question of fact for the jury. Here, in light of Metz's evidence of its intent and past practice, the assumption language in sections 1.1(c), 3.1(c), and 3.2(b) was sufficiently ambiguous to present a jury question. Metz also argues that there is no evidence to support the jury's finding that it expressly or impliedly assumed the seniority provisions of IBC's labor contract, but we find the language of the purchase agreement itself sufficient to support that finding.

V.

We reverse the judgment n.o.v. and affirm the denial of a new trial. We remand this cause for reinstatement of the jury's verdict and for determination of relief.

It is so ordered.

HENLEY, Senior Circuit Judge, concurring and dissenting.

Even though the evidence in question is less substantial than one might desire it to be, I can agree with the majority that the jury could have inferred that Clausen knew plaintiffs' jobs were at risk, refused to negotiate, and then lied about plaintiffs' precarious situation. I could further agree that the Union had a duty to negotiate and breached it. Even so I would affirm judgment n.o.v on this aspect of the case because on the record it is

clear that there is no causal relationship between failure of the Union to negotiate and any injury to plaintiffs. As the district court found:

> The evidence is uncontradicted that the Union must obtain majority approval by its membership of any negotiated contract provision. Similarly, the evidence is uncontradicted that the IBC employees became Metz employees on February 19, 1983. Further, as stated earlier, the IBC employees and the Metz workers possessed antagonistic interests. And, finally, the evidence stands undisputed that the Metz group outnumbered the IBC unit by almost two to one. Thus, the evidence supports only the conclusion that if the Union had negotiated with Metz and obtained full recognition of IBC seniority for all the IBC employees (endtailing the Metz workers) or for some of them (dovetailing with the Metz workers), the tentative proposal could not have been approved unless the members of the majority Metz group voted against their own economic interests. Accordingly, the jury's verdict cannot stand since it necessarily rests on the irrational inference from the evidence that the majority group would have voted against its own interest. Further, insofar as the Union had a right to reasonably believe that seniority negotiations would be futile or would not result in an agreement favorable to the IBC workers, the evidence cannot support a finding that the Union acted arbitrarily or dishonestly in failing to negotiate with Metz.

This reasoning is most persuasive and I find unacceptable the speculation of the majority that a possible

compromise of dovetailing is sufficient to support a finding of liability. *Barrett v. Thorofare Markets, Inc.*, 452 F.Supp. 880, 883-84 (W.D. Penn. 1978) (plaintiffs could not prove how local would have voted on pension agreement), cited with approval in *Anderson v. United Paperworkers International Union*, 641 F.2d 574, 580-81 (8th Cir. 1981). If there is no showing of probable injury, failure to negotiate should not call for reversal and remand for determination of a remedy.

With respect to the Union's failure to introduce into evidence before the arbitrator the Metz-IBC sales agreement, I find at most negligence for which no liability attaches.

In the first place, it is somewhat anomalous to suggest that the Union had a duty to negotiate to protect the IBC employees' seniority rights, but even though they did not do so, those employees' rights were protected by the contract nonetheless. If the contract so clearly gave that protection, what purpose would negotiations have served? A second, but related, problem with the jury's verdict is that the contract is simply too vague on the subject of the IBC employees' rights upon transfer to Metz to assume, as the court appears to do, that contract introduction would have made any difference at the arbitration. While the agreement provides in two separate provisions that Metz was (1) to assume the IBC collective bargaining agreement, and (2) to enter into a novation with the IBC employees respecting that agreement, it nowhere provides that the IBC employees would be dovetailed with the Metz employees or that they would not be endtailed. Both groups were covered by an industry-wide agreement, which did not provide for either

dovetailing or endtailing. The agreement as it applies to Metz and its original employees did not provide for dovetailing should Metz acquire a new company, and Metz could not have added a term to that agreement without the Union's participation simply by entering into a sales contract with IBC. *See, e.g., NLRB v. Katz*, 369 U.S. 736 (1962) (employer who changed wage and benefit provisions without consulting union violated duty to bargain collectively under the NLRA). The arbitrator correctly applied the rule that seniority rights can "exist only by virtue of and to the extent provided by a bargaining agreement." Arbitrator's Decision and Award at 6 (citing *Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968) (en banc)). Thus, with respect to seniority undoubtedly the sales agreement conferred no greater rights than the bargaining agreements, and the arbitrator ruled that those agreements did not dispose of the issue.

Consequently, although we as well as a jury might consider the Union's actions with regard to the arbitration distasteful, the plaintiffs simply have not shown that the Union's conduct in fact was a cause of any injury to them, and thus there can be no liability. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568 (1976) (focus is on "whether there is a substantial reason to believe that a union breach of duty contributed to the erroneous outcome"); *Humphrey v. Moore*, 375 U.S. 335, 351 (1964) (agreeing with trial court it was "idle speculation" for employees to assume result of hearing "would have been different had the matter been differently presented" by the union); *Anderson*, 641 F.2d at 580-81, 580 n.8, and cases there cited.

While I agree with the court that we should affirm the denial of a new trial, largely upon the findings and reasoning of the district court, I would affirm the judgment n.o.v. as well. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS JR., et al., Plaintiffs, vs. BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #442, et al., (sic) Defendants.	)	CV 83-0-652 ORDER (Filed August 13, 1986)

This matter is before the Court upon the Court's reconsideration of the motion (filing 50) of the defendant Metz Baking Co. for judgment notwithstanding the verdict, or in the alternative for a new trial, and the motion (filing 52) of the defendant Union for judgment notwithstanding the verdict, or in the alternative for a new trial. The Court, after a review of the briefs and the evidence in conjunction with the applicable law, finds that the motions for judgment notwithstanding the verdict should be granted and that the motions for new trial should be denied.

BACKGROUND

In this civil action, the plaintiffs, former employees of Interstate Brands Corporation and employees of defendant, Metz Baking Company filed suit against two defendants, the Bakery, Confectionery and Tobacco Workers Union Local No. 433 and the Metz Baking Company.

The defendant Metz Baking Company, with its principal place of business in Sioux City, Iowa, operated a bakery facility in Omaha, Nebraska, at 4383 Nicholas Street in 1983. Interstate Brands Corporation, at that time, also operated a bakery facility in Omaha, Nebraska, between 24th and 25th on Leavenworth Street in Omaha. In January, 1983, representatives of both companies agreed upon the sale of Interstate Brands Omaha bakery facility to Metz. The sale was closed on February 19, 1983, and Metz took possession of the plant, equipment and routes of Interstate Brands on February 21, 1983. Metz operated the Leavenworth Street bakery facilities without change until March 2, 1983. At that time, Metz consolidated all production at the Leavenworth Street plant and transferred the employees from the Nicholas Street plant to Leavenworth Street. This resulted in the lay-off of a substantial number of Interstate employees who had previously worked at the Leavenworth Street plant. Metz treated the former Interstate Brands' employees as new hires and placed (endtailed) them at the bottom of the seniority list which served as the basis for the lay-offs.

The defendant Union, Local No. 433, represented the employees at both facilities. The collective bargaining agreements for both bargaining units were identical.

A grievance was filed by the Union for the employees on the Interstate Brands' seniority list which alleged that the seniority provisions of the contract were unfairly and improperly implemented by the defendant Metz. The matter proceeded to arbitration before Mr. James A. Doyle on April 26, 1983. The Union took a neutral position. Employees on the seniority list of Metz and the seniority list of Interstate Brands, together with

the representatives of Metz, appeared and testified. The arbitrator denied the grievance which denial had the effect of upholding the action of Metz in laying off plaintiffs.

The defendant Local Union claims that it took a neutral position at the arbitration hearing because it represented both groups of employees. The defendant Local Union further claims that it represented both groups of employees in a fair and honest manner and fulfilled its duty to fairly represent all parties to the arbitration proceeding, including the plaintiffs.

The defendant Metz alleges that oral testimony by the witnesses at the arbitration hearing accurately informed the arbitrator of the contents of the sales contract between Interstate Brands Corporation and Metz Baking Company and that the decision of the arbitrator was fair, reasonable and proper under the circumstances.

DISCUSSION

The case was bifurcated for purposes of trial. The issue of liability was tried before a jury. The defendants moved for a directed verdict. The Court allowed the case to go to the jury with the admonition that even if a Court determines that a motion for directed verdict should be granted, it is considered better practice for a Court to send the case to the jury without directing a verdict and to then pass on the sufficiency of the evidence under a post-verdict motion. C. Wright and A. Miller, *Federal Practice and Procedure* § 2533 (1971); *Tackett v. Kidder,* 616 F.2d 1050, 1052-53 (8th Cir. 1980). The jury returned a special verdict finding in favor of the plaintiffs and against the

defendants. (Filing 49–Attached as Appendix A). Since this case was bifurcated for trial, the Court finds it is appropriate to rule on the motion for judgment notwithstanding the verdict at this time rather than proceeding with a lengthy and costly trial of the damages issues.

"The standard for granting judgment notwithstanding the verdict is the same as for a directed verdict." *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1235 (8th Cir. 1980), *citing Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 554 (8th Cir. 1968). As the Eighth Circuit stated in *Lord v. Wilkerson*, 542 F.2d 1034, 1035 (8th Cir. 1976):

> A motion for a directed verdict should be granted "only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Barclay v. Burlington Northern, Inc.*, 536 F.2d 263, 267 (8th Cir. 1976); *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co.*, 523 F.2d 833, 836 (8th Cir. 1975). As this Court has noted,
>
> > [A] motion for a directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions. * * * In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. (Citations omitted.)
>
> *Vickers v. Gifford-Hill & Co.*, 534 F.2d 1311, 1315 (8th Cir. 1976), *quoting Giordano v. Lee*, 434 F.2d 1227, 1231 (8th Cir. 1970), *cert. denied*, 403 U.S. 931 (1971).

> *See also Voegeli v. Lewis*, 568 F.2d 89, 92 (8th Cir. 1977); *Banks v. Koehring Co.*, 538 F.2d 176, 178 (8th Cir. 1976); *Griggs v. Firestone Tire and Rubber Co.*, 513 F.2d 851, 857 (8th Cir.), *cert denied*, 423 U.S. 865 (1975).

Lord v. Wilkerson, 542 F.2d at 1035. Therefore, the Court must view the evidence and legitimate inferences from the evidence in the light most favorable to the nonmoving party. However, a mere "scintilla" of evidence cannot support a verdict. *Tackett v. Kidder*, 616 F.2d 1050, 1052-53 (8th Cir. 1980).

The jury found that the union breached its duty of fair representation to the plaintiffs by (a) failing to negotiate with defendant Metz in regard to job seniority upon Metz' purchase of IBC's Omaha facility and by (b) the manner in which the Union handled and processed the grievance and arbitration proceeding.

After a careful review of the evidence, the Court concludes that the jury verdict must be set aside and judgment should be entered for the defendants.

In this case, the arbitrator's decision in favor of Metz Baking cannot be reviewed unless the Union was found to have breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567-69 (1976); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293 (9th Cir.), *cert. denied*, 459 U.S. 990 (1982); *see also Abernathy v. U.S. Postal Service*, 740 F.2d 6112 (8th Cir. 1984). Thus, Metz' alleged liability for breach of contract does not become an issue unless it is determined that the Union breached its duty of fair representation.

The duty of fair representation imposes upon the Union, as exclusive bargaining agent in the negotiation and administration of the collective bargaining contract, a responsibility and duty fairly to represent, as individuals as well as collectively, the employees within the bargaining unit. *Smith,* 619 F.2d at 1235, *citing Humphrey v. Moore,* 375 U.S. 335, 342 (1964).

The Eighth Circuit has described in detail the scope of the duty of fair representation:

> . While the scope of duty of fair representation has never been precisely defined, it "is a legal term of art, incapable of precise definition," and calls for an ad hoc review of each factual situation, *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* UAW, 469 F.2d 181, 182 (4th Cir. 1972), its evolution through the fires of court decisions leaves no doubt about its purpose. *St. Clair v. Local Union No. 515 of the International Brotherhood of Teamsters,* 422 F.2d 128, 130 (6th Cir. 1969). In particular,"the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes,* 386 U.S. at 182.
>
> In order to meet its purpose, the scope of the duty of fair representation is in some ways very broad. The responsibility fairly to represent employees is equal in scope to the union's broad authority in the negotiation and administration of the collective bargaining agreement. *Humphrey v. Moore,* 375 U.S. 335, 342 (1964). Thus the duty attaches to all stages of the negotiation and administration process and is owed to all

employees within the unit represented. However, because of the need to balance the individual interests of employees with their collective interests, the duty of fair representation must not be construed to subvert the basic purposes of organized labor by inhibiting union representation of collective interests. The Supreme Court has stated that in the negotiation process, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. at 338. The standard by which to measure union conduct was further defined in *Vaca v. Sipes*, 386 U.S. 171 (1967). In the administration of the collective bargaining agreement, the union has "a statutory obligation to serve the interests of all members [of a designated unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. *See also King v. Space Carriers, Inc.*, 608 F.2d 283, 286-287 (8th Cir. 1979).

The Fourth Circuit Court of Appeals clearly articulated the import of *Vaca* in *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, UAW, 469 F.2d 181, 183 (4th Cir. 1972):

> A union must conform its behavior to each of these three separate standards. First, it must treat fractions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete

> good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.
>
> * * * * * * * *
>
> * * * Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

Smith, 619 F.2d at 1236-37.

First, with regard to the jury's finding that the Union breached its duty of fair representation by failing to negotiate with Metz in regard to job seniority upon Metz' purchase of IBC's Omaha facility, the jury found that Metz both expressly and impliedly assumed IBC's collective bargaining agreement with the Union. If, indeed, the contract was assumed, then the Union had the duty to utilize the contractual grievance procedure to protect the IBC's contractual rights, which duty it fulfilled. Arbitration was necessary to determine the proper interpretation of the seniority provisions since the contract was silent on the subject of assembling one work force from two bargaining units.

In any event, even if this Court were to determine that the Union had a duty to negotiate under these circumstances there was insufficient evidence from which a jury could reasonably infer that the Union breached its duty. All the evidence leads to the conclusion that the

Union had no reason to believe that it needed to negotiate with Metz about seniority until Metz began laying off workers. Also, either agreement provided for renegotiation. Thus, the Union had no reason to believe that it could force Metz to renegotiate seniority provisions or that it could successfully renegotiate a more favorable situation for plaintiffs. Even so, in negotiating or renegotiating a collective bargaining agreement, "the sole inquiry is whether under all the circumstances the Union has considered the interests of *all* of its members." *Smith v. Joseph E. Seagram & Sons*, 634 F.Supp. 44, 47 (W.D. Ky. 1985). In this case, the jury could not properly find that the Union breached a duty to negotiate with Metz to obtain more favorable treatment for plaintiffs over Metz' workers. The Union was obligated to fairly consider the interests of original Metz' workers as well. Therefore, there was no causal connection between a failure to negotiate, if such a duty existed, and any harm that came to the plaintiffs.

The evidence was undisputed that Metz was operating, in tandem, the Leavenworth Street and Nicholas Street plants between February 19, and March 2, 1983. Marlin Lessman, employed by Metz as Vice-President, Secretary and General Counsel, testified that Metz recognized the seniority of the IBC workers during the time the plants were run in tandem. The IBC employees saw no changes at work except the company's name on their paychecks. There is simply no evidence from which the jury could reasonably infer that the Union acted arbitrarily since the Union was reasonable in believing that no IBC seniority problem existed until March 1, 1983, when Metz sent out layoff notices. And, at that time, the

Union began processing a grievance for the IBC employees. The Union did not stand obligated to investigate the company's position at an earlier time, since the company was operating the two plants as separate operations. *Smegal v. Gateway Foods*, 763 F.2d 354 (8th Cir. 1985).

There was a conflict in testimony between Marlin Lessman and Bernard Clausen, the Baker's Union President. Mr. Lessman testified he told Mr. Clausen that Metz intended to treat the IBC workers as new hires. Clausen denies that Lessman told him that. One witness, James Walker, testified that Mr. Clausen told one IBC employee, after the purchase of the plant, that his job was secure – "not to worry." The witness could not pinpoint when Clausen made the statement to him. He did place the statement at a time after Metz purchased the plant, but before the layoff notices. Assuming that the jury (a) believed Walker's testimony (b) considered Clausen's actions dishonest and (c) that such actions deterred the IBC workers from requesting that the Union bargain with Metz, the evidence still does not support the jury's verdict.

The evidence is uncontradicted that the Union must obtain majority approval by its membership of any negotiated contract provision. Similarly, the evidence is uncontradicted that the IBC employees became Metz employees on February 19, 1983. Further, as stated earlier, the IBC employees and the Metz workers possessed antagonistic interests. And, finally, the evidence stands undisputed that the Metz group outnumbered the IBC unit by almost two to one. Thus, the evidence supports only the conclusion that if the Union had negotiated with Metz and obtained full recognition of IBC seniority for all

the IBC employees (endtailing the Metz workers) or for some of them (dovetailing with the Metz workers), the tentative proposal could not have been approved unless the members of the majority Metz group voted against their own economic interests. Accordingly, the jury's verdict cannot stand since it necessarily rests on the irrational inference from the evidence that the majority group would have voted against its own interest. Further, insofar as the Union had a right to reasonably believe that seniority negotiations would be futile or would not result in an agreement favorable to the IBC workers, the evidence cannot support a finding that the Union acted arbitrarily or dishonestly in failing to negotiate with Metz.

The evidence was insufficient for a jury to reasonably find that negotiations between Metz and the Union would have affected the layoffs. The only testimony on point indicated that Metz intended to keep its own employees on the job when it transferred the Nicholas Street operation to the Leavenworth Street facility. The evidence was undisputed that Metz, in fact, endtailed the IBC employees covered by the collective bargaining contracts with the Operating Engineers Union and the Teamsters Union. No testimony contradicts Mr. Lessmann's statement that Metz felt that nothing in its sales contract with IBC prevented it from endtailing the IBC employees. Also, as stated earlier, the evidence does not support a conclusion that the Union membership would have approved a negotiated settlement to dovetail. Accordingly, Metz had no reason or inclination to agree to handle the layoffs in any other way.

The jury also found that the Union breached its duty of fair representation toward the IBC employees in the manner it handled the arbitration proceedings and because it did not present a copy of the sales contract between Metz and IBC to the Arbitrator. The Court finds that neither of these actions by the Union amounted to a breach of the Union's duty of fair representation, as a matter of law.

Resolving all conflicts in the evidence in favor of the plaintiffs and accepting their testimony in full, the evidence shows that the Union initiated a grievance on behalf of the IBC employees as soon as Metz issued layoff notices to the IBC employees. The IBC employees found the wording of the grievance satisfactory. The Union filed the grievance and requested arbitration of the grievance upon receiving the signed grievance from the IBC employees. The Union turned over the handling of the grievance to its attorney. The Union informed both groups it intended to take a neutral position in the arbitration. The Union allowed the IBC group and the Metz group to select their own representatives to participate in the arbitration.

The Union arranged for and attended meetings between the representatives of the two groups with the Union's attorney in Sioux City, Iowa. The meeting with the IBC employees lasted about ten minutes. The meeting for the Metz workers lasted about one-half hour. At the meetings with both groups, the employees discussed the reasons why they felt they should keep their jobs.

At the meeting with the Union attorney, one IBC employee (Walker) asked Clausen about the IBC-Metz

sales agreement. Clausen told him it would be at the arbitration hearing. The IBC employees did not discuss Metz' assumption of the IBC collective bargaining agreement or the unilateral change of their seniority date by Metz. The Union attorney advised the IBC employees they could hire other counsel for the arbitration, but did not tell them (Marsh) that they had to pay for such attorney. The Union attorney told them he believed the "successor" clause in the collective bargaining agreement would be "kicked out" by the court.

At the arbitration, the Union attorney met briefly before the hearing started with the witnesses for both groups. At no time during the hearing did the Union attorney restrict what any witness from either group said. None of the IBC witnesses testified at the arbitration hearing regarding the absence of or the need for production of the sales agreement at the hearing. The Union allowed anyone from either group (who wished to do so) to testify.

The evidence shows that the Union treated both the IBC employees and the Metz employees fairly and with substantial equality. The evidence cannot support a finding that the Union breached its duty of fair representation toward the IBC employees, unless the Union arbitrarily or dishonestly ignored the claimed significance of the written sales contract in advocating the interests of the IBC group at the arbitration proceedings. *Crusco v. Fisher & Bro. Inc.*, 458 F.Supp. 413, (S.D.N.Y. 1978).

If the Union improperly ignored the claimed significance of the written sales contract, the jury might have concluded that the Union attorney's abbreviated meeting

with the IBC employees and his failure to discuss certain issues with them rendered the Union's position less than neutral and rendered the Union's failure to submit a copy of the sales contract a breach of the Union's duty of fair representation.

With regard to the sales contract between Metz and IBC sufficient evidence existed for the jury to find that the Union's attorney discussed the nature of the contract only briefly with Lessmann prior to the arbitration. The evidence further supports the conclusion that the Union viewed the specific terms of the sales contract as "immaterial" to the arbitration hearing. The evidence further justifies a finding that the Union attorney relied upon Lessmann's representations both before and at the arbitration hearing concerning Metz's obligations under the sales contract. Nonetheless, that evidence, does not support a finding that the Union breached its duty of fair representation toward the IBC employees.

In a recent decision, the Eighth Circuit Court of Appeals confronted an identical set of facts in which a union allegedly improperly failed to investigate and examine a purchase contract between two companies. The Court found:

> We think this case requires analysis at two stages. The first is approximately July 6, 1981, when the operations were transferred. Up to then the Union had accepted the employers' representation that subcontracting was involved. It had not attempted to examine the contracts between National and Gateway. It was not aware of the leverage it could exert by refusing to make a 'satisfactory' agreement with

> Gateway. Although it had negotiated certain favorable terms for former National employees when hired by Gateway, the Union had pretty clearly worn its Gateway hat while negotiating. It refused to permit National employees to participate in the bargaining process. This was all consistent with acceptance of the subcontracting theory.
>
> * * *
>
> The first stage was carefully considered by the district court, and we agree with the conclusion reached. The proof as of that stage shows failure to investigate the transaction and failure to perceive a legal theory. 'Mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation.' *N.L.R.B. v. Am. Postal Wkrs., Union, Etc.*, 618 F.2d 1249, 1255, (8th Cir. 1980). If there were no second stage, summary judgment for defendants would have been appropriate.

Smegal v. Gateway Foods, 763 F.2d 354, 359 (8th Cir. 1985).

In *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), the Court, at length, defines arbitrary Union conduct and its basis in sound policy. The Court states:

> We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. *See e.g., Castelli*, 752 F.2d at 1482; *Dutrisac*, 749 F.2d at 1273; *Singer v. Flying Tiger Line, Inc.*, 652 F.2d at 1355; *Ness v. Safeway Stores, Inc.*, 598

F.2d 558, 560, (9th Cir. 1979); *see also Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976). We have said that a union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing. *See Dutrisac*, 749 F.2d at 1273. In short, we do not attempt to second-guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued. We reaffirm that principle here.

Sound policy reasons militate against imposing liability on unions for errors of judgment made while representing their members in the collective bargaining process. In *Dutrisac*, we recognized that holding unions liable for such errors would serve ultimately to "defeat the employees' collective bargaining interest in having a strong and effective union." 749 F.2d at 1273. If unions were subject to liability for "judgment calls", it would necessarily undermine their discretion to act on behalf of their members and ultimately weaken their effectiveness. In the long run, the cost of recognizing such liability would be borne not by the unions but by their memberships. Not only would the direct costs of adverse judgments be passed on to the members in the form of increased dues, but, more importantly, unions would become increasingly reluctant to provide guidance to their members in collective bargaining disputes. Such a result would be inconsistent with our oft repeated commitment to construe narrowly the

> scope of duty of fair representation in order to preserve the unions' discretion to decide how best to balance the collective and individual interests that they represent.
>
> Freeing a union from liability for ordinary acts of negligence in the performance of its representational responsibilities requiring judgment on its part, reflects a balance of the union's organizational interest against the individual interests of its members. Our cases, and those of the Supreme Court, tip the balance in favor of the union, and accept the consequence of uncompensated loss sustained by an individual union member. Whether liability for a loss occasioned by ordinary negligence of the union might be spread more equitably among the membership as a whole, rather than be borne by the individual member who is harmed, is no longer an open question.

Peterson, 771 F.2d at 1254-55.

Even if the jury found that the Union's attorney inadequately investigated Metz' obligations under the sales contract with IBC, that lack of investigation can not be said to comprise a breach of the Union's duty of fair representation toward the IBC employees. *Hellums v. Quaker Oats Co.*, 760 F.2d 202 (8th Cir. 1985) ("We do not take issue with the finding of the District Court that Local 125 was negligent in its investigation. Mere negligence, however, does not rise to the level of a breach of the duty of fair representation." *Id.* at 206.)

Similarly, even if the jury found the Union attorney's view of the significance of the written sales contract

clearly wrong[1] the Union urges that such a finding does not support the conclusion the Union breached its duty of fair representation toward the IBC employees. Mere failure to perceive a legal theory does not comprise a breach of the Union's duty of fair representation. *Smegal v. Gateway Foods*, 763 F.2d 354, 359 (8th Cir. 1985); *Sanders v. Youthcraft Coats & Suits, Inc.*, 700 F.2d 1226 (8th Cir. 1983). Further, even if the jury found that the Union's attorney improperly relied upon Mr. Lessmann's testimony at the arbitration hearing because Lessmann inaccurately testified regarding Metz' obligations under the sales contract, that finding does not support the conclusion the Union violated its duty of fair representation toward the IBC employees. At most, the Union's actions comprised poor judgment. Such actions do not support the jury's verdict. *Taylor v. Belger Cartage Service*, 762 F.2d 665 (8th Cir. 1985).

In sum, then, the evidence before the jury, at most, showed that the Union acted negligently in regard to its handling of the written sales contract between Metz and IBC. Such a showing does not support the jury's finding that the Union committed a breach of its duty of fair representation toward the IBC employees on the basis of arbitrary or perfunctory conduct.

One IBC employee, Mr.Walker, testified that he asked President Clausen about the sales contract and Mr. Clausen said the Union would have it at the arbitration hearing. From that testimony, the jury might have concluded the Union lied to the IBC employees and treated

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[1] The jury evidently made such a finding because it found Metz expressly assumed the IBC collective bargaining contract with the Union.

their claims dishonestly. However, even that evidence, does not support the jury's verdict in light of the totality of the evidence. The Union's attorney, not Mr. Clausen, was handling the arbitration hearing. Mr. Walker and the other IBC employees know the attorney was handling the grievance hearing. Thus, even if the jury found that Mr. Clausen lied to Mr. Walker about the sales contract, that finding does not support the conclusion the Union's attorney treated the IBC employees and their claims dishonestly. Since it does not, no basis exists to find that the Union breached its duty of fair representation toward the IBC employees.

The Union's position finds additional support in the great weight of the other evidence. The Union's attorney did not know, personally, any of the IBC or Metz workers before he met with them in regard to the arbitration. No animus or other reason for him to treat the IBC employees dishonestly existed. Further, the evidence stands undisputed that the Union's attorney relied on Mr. Lessmann's statements about the contents of the sales contract because he trusted Lessmann, not because he wanted to deceive the IBC employees. So too, the evidence stands uncontroverted that the Union's attorney viewed the written sales agreement as immaterial to the arbitration hearing and as adequately presented in Mr. Lessmann's testimony at the hearing. Finally, all employees, who testified at trial and at the arbitration hearing, admitted that the Union's attorney in no way restricted their testimony. In sum, then, the great weight of evidence shows that the Union's agent, who handled the arbitration, in no way dealt with the IBC employees

dishonestly. And since the proof shows no deceit or dishonesty, the jury could not properly find that the Union breached its duty of fair representation. As stated earlier, the Union attorney's mere failure to assert a possible claim under the sales contract does not comprise a breach of duty. *Russom v. Sears, Roebuck & Co.*, 558 F.2d 439, 442 (8th Cir. 1977).

In summary, the jury's verdict in regard to the Union's breach of its duty toward the IBC employees cannot stand close scrutiny. The weight of the evidence shows that the Union treated both the IBC and the Metz groups fairly and without discrimination. At most, the Union exercised poor judgment in its handling of the sales contract issue. And, in no way did the Union's attorney deal with the IBC employees and their claim dishonestly. Thus, the jury cannot be allowed to "second-guess the arbitration strategy of the union attorney." *Johnson v. Jos. Schlitz Brewing Co.*, 581 F.Supp. 338, 344 (M.D.N.C. 1984). *See Liotta v. Nat'l Forge Co.*, 473 F.Supp. 1139, 1144 (W.D. Penn. 1979). As a result, the decision of the arbitrator must stand. The issue of Metz' alleged liability for breach of contract need not be reached.

In any event, even assuming the jury correctly found that the Union breached its duty of fair representation in its handling of the grievance at arbitration, the evidence does not support the conclusion the Union's actions tainted the arbitration award. In *Brown v. TWA*, 746 F.2d 1354 (8th Cir. 1984), the Court of Appeals indicated that tainting an arbitration award means denying the arbitrator *essential facts* upon which to make a ruling. Nothing in the evidence shows that Arbitrator Doyle did not have the essential facts of the case before him.

Arbitrator Doyle clearly knew of the sale. Further, the Arbitrator had Metz' interpretation of the sales contract. At most, the Arbitrator did not have the IBC employees' reading of the written sales agreement and their contentions as to its meaning.[2] In turn the jury had no basis to conclude that Arbitrator Doyle, as a result of the Union's actions or inactions, did not have all the facts necessary to make a valid decision. Indeed, if the Arbitrator felt that a copy of the written contract was necessary for his dispute determination, he possessed the right to ask for a copy of it. Therefore, the jury lacked an evidentiary basis to conclude that the Union's purported breach resulted in tainting the arbitration decision. Such a conclusion finds further support in the undisputed evidence that the collective bargaining agreement did not contain any language regarding how to merge the Metz and IBC seniority lists. And, the sales agreement, at most, obligated Metz to assume the IBC contract in full. Accordingly, nothing in the sales contract required Arbitrator Doyle to handle the merger issue differently. At most, the absent sales contract, even if Doyle agreed with the IBC employees, might have strengthened the IBC employees' case at arbitration. Anything beyond such a conclusion, lacks evidentiary support. And, that conclusion does not

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[2] In its brief to the Arbitrator, the Union did argue that Metz had assumed the IBC collective bargaining agreement. (Defendant's Ex. 108 at 5-6.) Further, the brief of the Union raised as an issue before the Arbitrator whether Metz had impliedly assumed IBC's contract by its conduct. (*Id.* 15 8.) Thus, the Union argues that the only matter not before the Arbitrator was the IBC employees' interpretation of the written sales contract.

support the jury's verdict. *Hardee v. North Carolina Allstate Service, Inc.*, 537 F.2d 1255, 1257-58 (4th Cir. 1976).

Accordingly, the Court finds that the jury verdict must be set aside and that the defendants' motions' (sic) for judgment notwithstanding the verdict should be sustained.

Accordingly,

IT IS ORDERED that the motion (filing 50) of defendant Metz Baking for judgment notwithstanding the verdict should be and hereby is granted. The alternative motion for new trial is denied.

IT IS FURTHER ORDERED that the motion (filing 52) of defendant Union for judgment notwithstanding the verdict should be and hereby is granted. The alternative motion for new trial is denied.

DATED this 13th day of August, 1986.

BY THE COURT:

/s/ C. Arlen Beam
C. ARLEN BEAM, CHIEF
JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 91-3549NE, 91-3553NE, 91-1563NE, 92-1591NE

Selman Thomas, Jr., et al.,	*	
	*	
Appellants,	*	Appeals from the
	*	United States
vs.	*	District Court for
	*	the District
Bakery, Confectionery, and Tobacco Workers International Union, Local #433; Metz Baking Company,	*	of Nebraska
	*	
	*	
Appellees,	*	
	*	
Curtis Burton; et al.,	*	
	*	
Interveners/Appellees.	*	

Caption intentionally shortened by Petitioners

JUDGMENT

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

Judge Beam took no part in the consideration or decision of this case.

February 12, 1993

A true copy.

ATTEST: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2214NE

Selman (Joe) Thomas, Jr., et al Appellants, vs. Bakery, Confectionery and Tobacco Workers Union, etc., et al, Appellees.	* * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

September 24, 1987

Order entered at the direction of the Court;

Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al.,	)	CV 83-0-652
Plaintiffs,	)	COURT'S CHARGE TO THE JURY
vs.	)	
BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL #433, et al.,	)	[Filed JUL 16 1985]
Defendants.	)	

* * *

Jury instructions numbers 1 through 7 and 14 through 25 intentionally omitted by counsel for the Petitioners.

INSTRUCTION NO. 8

Defendant Union acted as the exclusive collective bargaining representative for the production employees of Interstate Brands Corporation at its plant in Omaha, Nebraska, including plaintiffs in this case, and the production employees of defendant Metz at its plants in Omaha, Nebraska. As the collective bargaining representative of both groups of employees, defendant Union was obligated by law to represent both groups of employees fairly in its dealing with their employers in regard to

their rights under their collective bargaining agreements. This obligation is known as defendant Union's duty of fair representation.

A wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The duty of a union is to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary or perfunctory conduct. A breach of this duty occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, perfunctory, discriminatory, or in bad faith.

"Perfunctory" means without concern or solicitude, indifferent.

INSTRUCTION NO. 9

In order for the plaintiffs to prevail on their claim against the Union for breach of its duty to fairly represent the plaintiffs by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz's purchase of the Interstate Brands Corporations's Omaha facility, the plaintiffs must prove by a preponderance of the evidence the following elements:

First, that by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz's purchase of the Interstate Brands Corporations's Omaha facility:

a. The defendant Union acted with hostility or in a discriminatory manner; *or*

b. The defendant Union acted dishonestly or in bad faith; *or*

c. The defendant Union acted arbitrarily or in a perfunctory manner.

Honest, but mistaken, conduct may not be considered arbitrary, discriminatory or bad faith conduct. Proof of mere negligence, poor judgment or ineptitude, is not sufficient to justify a finding that the Union breached its duty of fair representation. However, evidence that the Union acted without concern may support a finding that the Union acted in an arbitrary or perfunctory manner.

If you find that the plaintiffs have proven by a preponderance of the evidence that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate, then you must proceed to determine whether the plaintiffs' interests were prejudiced by the breach of duty.

In order to prevail on the issue that the interests of the plaintiffs were prejudiced by the breach of duty, the plaintiffs must prove by a preponderance of the evidence that had the Union negotiated the defendant Metz would not have laid off the plaintiffs in March, 1983.

Now, in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that (1) the Union breached its duty of fair representation to the plaintiffs by failing to negotiate and (2) that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of the defendant Union and

against the plaintiffs on plaintiffs' claim that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate.

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that the Union breached its duty of fair representation to the plaintiffs by failing to negotiate and that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of the plaintiffs and against the defendant Union on plaintiffs claim that the Union breached its duty of fair representation by failing to negotiate.

INSTRUCTION NO. 10

In addition, the plaintiffs allege the defendant Union committed a breach of its duty of fair representation toward the plaintiffs by the position taken between the seniority claims of plaintiffs and those of defendant Metz' employees in processing plaintiffs' grievance and/or by not presenting a copy of a sales contract between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance.

In order for the plaintiffs to prevail on their claim against the Union for breach of its duty to fairly represent the plaintiffs under either or both of these theories, the plaintiffs must prove by a preponderance of the evidence the following elements:

First, that in the investigating and processing of the plaintiffs' seniority claims and grievances:

a. The defendant Union acted with hostility or in a discriminatory manner; *or*

b. The defendant Union acted dishonestly or in bad faith; *or*

c. The defendant Union acted arbitrarily or in a perfunctory manner.

As you were instructed before, honest, but mistaken, conduct may not be considered arbitrary, discriminatory or bad faith conduct. Proof of mere negligence, poor judgment or ineptitude, is not sufficient to justify a finding that the Union breached its duty of fair representation. However, evidence that the Union acted without concern or solicitude or gave plaintiffs' claims and grievance only cursory attention may support a finding that the Union acted in an arbitrary or perfunctory manner.

If you find that the plaintiffs have proven by a preponderance of the evidence that the Union breached its duty of fair representation to the plaintiffs in the investigation and processing of the plaintiffs' seniority claims and grievances, then you must proceed to determine whether the plaintiffs' interests were prejudiced by the breach of duty.

In order to prevail on the issue that the interests of the plaintiffs were prejudiced by the breach of duty, the plaintiffs must prove by a preponderance of the evidence that the conduct of the defendant Union tainted, that is seriously undermined, the integrity of the arbitration process.

Now, in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that (1) the Union

breached its duty of fair representation to the plaintiffs in the investigating and processing of the plaintiffs' seniority claims and grievances and (2) that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you must find in favor of defendant Union and against the plaintiffs on plaintiffs' claim that the Union breached its duty of fair representation to the plaintiffs by the position taken and/or by not presenting a copy of the sales contract.

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that the Union breached its duty of fair representation to the plaintiffs and that such a breach of duty, if it did occur, did prejudice the interests of the plaintiffs, then you will proceed in your deliberations to consider the plaintiffs' claim against defendant Metz for breach of the Collective Bargaining Agreement.

In this regard you are instructed that a decision by an arbitrator in a labor arbitration proceeding is final and binding unless the Union breached its duty of fair representation to the prejudice of the plaintiffs as earlier explained in this instruction.

INSTRUCTION NO. 11

You are instructed that the failure of defendant Union to negotiate with defendant Metz in regard to plaintiffs' job seniority upon defendant Metz' purchase of the Interstate Brands Corporation's Omaha facility, or, the position taken by defendant Union as to the seniority claims of plaintiffs and those of defendant Metz' employees in the processing of plaintiffs' grievance do

not alone comprise a breach of defendant Union's duty of fair representation toward plaintiffs. Rather, plaintiffs must further establish that those actions of defendant Union were done with hostility toward plaintiffs, discriminated against them, were done in bad faith or were arbitrary or perfunctory under all the facts and circumstances. And, plaintiffs must also show that the conduct of the defendant Union prejudiced plaintiffs' interests.

You are further instructed that defendant Union's failure to present a copy of a sales agreement between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance does not by itself comprise a breach of defendant Union's duty of fair representation toward plaintiffs. Rather, plaintiffs must further establish that such action of defendant Union was done with hostility toward plaintiffs, discriminated against them, was done in bad faith or was arbitrary or perfunctory under all the facts and circumstances. And, plaintiffs must also show that the conduct of the defendant Union prejudiced plaintiffs interests.

INSTRUCTION NO. 12

Before reaching the issue of whether defendant Metz breached a Collective Bargaining Agreement, you must consider whether defendant Metz either agreed to be bound to the seniority provisions of the Collective Bargaining Agreement or otherwise assumed the seniority provisions of the Collective Bargaining Agreement that had been in effect between the plaintiffs and Interstate Brands Corporation. The defendant Metz was not bound by the substantive provisions of the Collective Bargaining

Agreement, unless the defendant Metz had agreed to or assumed all of the terms of the Collective Bargaining Agreement between plaintiffs and Interstate Brands Corporation or had agreed to or assumed those portions of the Collective Bargaining Agreement between plaintiffs and Interstate Brands Corporation that guaranteed plaintiffs seniority. In this regard, you must decide whether defendant Metz expressly agreed to be bound to the seniority provisions of the Collective Bargaining Agreement through the sales agreement executed between defendant Metz and Interstate Brands Corporation or impliedly assumed the seniority provisions of the Collective Bargaining Agreement through its acts or omissions at the time of or after the effective date of the sales agreement.

In order to prevail on the issue that defendant Metz was bound by the seniority provisions of the Collective Bargaining Agreement that had been in effect between the plaintiffs and Interstate Brands Corporation, the plaintiffs must prove by a preponderance of the evidence at least one of the following elements:

1. That defendant Metz expressly agreed to be bound to the seniority provisions of the Collective Bargaining Agreement in the sales agreement executed between defendant Metz and Interstate Brands Corporation; or

2. That defendant Metz impliedly assumed the seniority provisions of the Collective Bargaining Agreement through its actions.

You are instructed that the Metz purchase of substantially all of the assets of Interstate Brands Corporation, or

the continuing employment by Metz of substantially all of the Interstate Brands work force immediately after the effective date of the sales agreement do not, by themselves, comprise an implied assumption of the seniority provisions of the Interstate Brands Corporation-Union Collective Bargaining Agreement. However, whether defendant Metz misled the employees of Interstate Brands Corporation into believing that they were continuing their employment on seniority terms identical to those of their Interstate Brands Corporation employment is a factor that may be considered by you in determining whether Metz agreed to assume the seniority provisions of the Collective Bargaining Agreement.

Now in summary, if you find after applying these instructions of law that the plaintiffs have not proven by a preponderance of the evidence that the defendant Metz was bound by the seniority provisions of the Collective Bargaining Agreement that had been in effect between the plaintiffs and the Interstate Brands Corporation, then you must find in favor of the defendants and against the plaintiffs on plaintiffs claim that Metz breached the Collective Bargaining Agreement.

On the other hand if you find from a preponderance of the evidence that the plaintiffs have proven that defendant Metz was bound by the seniority provisions of the Collective Bargaining Agreement, then you will proceed in your deliberations to consider whether defendant Metz breached the Collective Bargaining Agreement.

INSTRUCTION NO. 13

You are instructed that the burden is on the plaintiffs to prove by a preponderance of the evidence the following essential elements before they may prevail on their claim against defendant Metz for breach of the Collective Bargaining Agreement.

1. That Metz breached the seniority provisions of the Collective Bargaining Agreement by "endtailing," that is, treating the plaintiffs as new hires with a seniority date of February 19, 1983, and placing them at the bottom of the seniority list; *and*

2. That the plaintiffs were laid off as a result of the breach of the Collective Bargaining Agreement.

If, from the evidence, you find that the plaintiffs have proved by a preponderance of the evidence each and all the essential elements of their claim that Metz breached the Collective Bargaining Agreement and have previously found that Metz was bound by the seniority provisions of the Collective Bargaining Agreements, then you must find in favor of the plaintiffs and against defendant Metz on the plaintiffs' claim that Metz breached the Collective Bargaining Agreement.

If, however, from the evidence you do not find that the plaintiffs have proven by a preponderance of the evidence both of the essential elements outlined above, then you must find in favor of defendant Metz and against the plaintiffs on the plaintiffs' claim that Metz breached the Collective Bargaining Agreement.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al.,	)	CV 83-0-652
Plaintiffs,	)	SPECIAL VERDICT
vs.	)	(Filed
BAKER (sic), CONFECTIONERY AND TOBACCO WORKERS UNION, LOCAL #433, et al.,	)	Jul. 16, 1985)
Defendants.	)	

QUESTION NO. 1: Do you find from a preponderance of the evidence that defendant Union breached its duty of fair representation with respect to the plaintiffs by failing to negotiate with the defendant Metz in regard to their job seniority upon defendant Metz' purchase of the Interstate Brands Corporation's Omaha facility?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES" , GO TO QUESTION 2.
IF YOUR ANSWER IS "NO", GO TO QUESTION 3.

QUESTION NO. 2: Do you find from a preponderance of the evidence that had the Union negotiated in regard to their job security upon defendant Metz' purchase of Interstate Brands Corporation's Omaha facility

the defendant Metz would not have laid off the plaintiffs in March, 1983?

ANSWER: "YES" or "NO" ANSWER: Yes

GO ON TO QUESTION 3.

QUESTION NO. 3: Do you find from a preponderance of the evidence that the Union breached its duty of fair representation with respect to the plaintiffs by the position taken by the Union with regard to the seniority claims of the plaintiffs and those of defendant Metz' previous employees in processing plaintiffs' grievance *and/or* by not presenting a copy of a sales contract between defendant Metz and Interstate Brands Corporation into evidence at the arbitration hearing on their grievance?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 4. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 4: Do you find from a preponderance of the evidence that the conduct of the defendant Union tainted, that is seriously undermined, the integrity of the arbitration process.

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 5. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 5: Do you find from a preponderance of the evidence that defendant Metz expressly

agreed to be bound to the seniority provisions of the Collective Bargaining Agreement in the sales agreement executed between defendant Metz and Interstate Brands Corporation?

ANSWER: "YES" or "NO" ANSWER: Yes

GO ON TO QUESTION 6.

QUESTION NO. 6: Do you find from a preponderance of the evidence that defendant Metz impliedly assumed the seniority provisions of the Collective Bargaining Agreement through its actions?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES" TO EITHER OR BOTH OF QUESTIONS 5 OR 6, GO TO QUESTION 7. IF YOUR ANSWER IS "NO" TO *BOTH* QUESTIONS 5 *AND* 6, YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 7: Do you find from a preponderance of the evidence that defendant Metz breached the seniority provisions of the Collective Bargaining Agreement?

ANSWER: "YES" or "NO" ANSWER: Yes

IF YOUR ANSWER IS "YES", GO TO QUESTION 8. IF YOUR ANSWER IS "NO", YOUR FOREPERSON IS TO DATE AND SIGN THIS SPECIAL VERDICT.

QUESTION NO. 8: Do you find from a preponderance of the evidence that the plaintiffs were laid off as

a result of the breach of the Collective Bargaining Agreement?

ANSWER: "YES" or "NO" ANSWER: Yes

YOUR FOREPERSON IS TO NOW DATE AND SIGN THIS SPECIAL VERDICT.

DATED this 16 day of July, 1985.

/s/ Ellen L. Zurcher
FOREPERSON

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, Jr., et al.	)	CIVIL NO. 83-0-652
Plaintiffs,	)	ORDER ON PRE-TRIAL CONFERENCE
vs.	)	
BAKERY, CONFECTIONERY, AND TOBACCO WORKERS UNION LOCAL NO. 433, and METZ BAKING COMPANY,	)	(Filed JUL 15, 1985)
Defendants.	)	

A final pre-trial conference was held on the ~~17th~~ [28th] day of February, 1985. Appearing for the parties as counsel were: Plaintiff, Thomas J. Young, 6910 Pacific, Suite 320, Omaha, Nebraska 68106; Defendant Metz Baking Company, Joe P. Cashen, 10306 Regency Parkway Drive, Omaha, Nebraska 68114; and Defendant Bakery, Confectionery and Tobacco Workers Union, Local No. 433, ~~Harry H.~~ [MacDonald] Smith, 632-640 Badgerow Building, Sioux City, Iowa 51101.

A. Exhibits in Evidence.

Exhibit lists will be prepared by each party for submission to the Court and all other parties pursuant to the Court's Amended Order Setting Progression of Jury Case, #9.

B. Foundation for Exhibits.

The Stipulation or waiver of foundation for all exhibits will be indicated on the exhibit list to be submitted pursuant to A, above.

C. Uncontroverted Facts.

The parties have agreed that the following may be accepted as established facts for purposes of this case only:

1. A General Statement of the Case:

The Defendant Metz Baking Company, with its principal place of business in Sioux City, Iowa, operated a bakery facility in Omaha, Nebraska at 4383 Nicholas Street in 1983. Interstate Brands Corporation, at that time, also operated a bakery facility in Omaha, Nebraska between 24th and 25th and Leavenworth Street. In January, 1983, representatives of both companies agreed upon the sale of Interstate Brands' Omaha bakery facility to Metz. The sale was closed on February 19, 1983, and Metz took possession of the plant, equipment and routes of Interstate Brands on February 21, 1983. Metz operated the Leavenworth Street bakery facilities without change until March 2, 1983. At that time, Metz consolidated all production in the Leavenworth Street plant and transferred the employees from the Nicholas Street plant to the Leavenworth Street plant. This resulted in the lay-off of a substantial number of Interstate employees who were previously working at the Leavenworth Street plant. Metz treated the former Interstate Brands' employees as new hires

and placed them at the bottom of the seniority list which served at the basis for the lay-offs.

The Defendant Union, Local No. 433, represented the employees at both facilities. A grievance was filed by the employees on the Interstate Brands' seniority list which alleged that the seniority provisions of the contract were unfairly and improperly implemented by the Defendant Metz. The matter proceeded to arbitration before Mr. James A. Doyle on April 26, 1983. The Union took a neutral position. Employees on the seniority list of Metz and the seniority list of Interstate Brands together with Metz appeared and testified. The arbitrator denied the grievance which had the result of upholding the action of Metz in laying off Plaintiffs.

The Plaintiffs in this action allege that the Defendants intentionally or negligently failed to introduce the agreement of sale entered into between Metz and Interstate Brands at the arbitration hearing. That this failure resulted in fraud or deceit being practiced upon the arbitrator by Metz and evidences a breach of the Defendant Union's duty to fairly represent the Plaintiffs. Further, Plaintiffs allege that the agreement between Metz and Interstate Brands evidenced that Metz was required to recognize and assume all obligations of Interstate Brands to its employees under that company's Collective Bargaining Agreement and that pursuant to the Collective Bargaining Agreement plant-wide seniority would control lay-offs and would have resulted in few, if any, lay-offs of former Interstate Brands' employees.

> The Defendant Metz alleges that oral testimony by the witnesses at the arbitration hearing accurately informed the arbitrator of the contents of the agreement between Metz and Interstate Brands and that the Arbitrator's decision was fair, reasonable and proper under the circumstances. The Defendant Local Union alleges that it took a neutral position at the arbitration hearing since it represented both groups of employees and it did so in a fair and honest manner and fulfilled its duty (sic) fairly represent all parties to the arbitration proceeding, including the Plaintiffs.

2. Jurisdiction is conferred on this Court by 29 U.S.C. 185 (a) and (c), as Amended, without respect to the amount in controversy and without regard to the citizenship of the parties.

3. That the Plaintiffs, at all times material to this action, were first, employees of IBC and then employees of Defendant, Metz Banking (sic) Company and represented exclusively by Defendant Bakery Confectionery and Tobacco Workers Union, Local No. 433.

4. That the Defendant Metz Baking Company was and is engaged in an industry substantially affecting interstate commerce.

5. That the Defendant Bakery Confectionery and Tobacco Workers Union, Local No. 433 is an unincorporated association and was, at all times material to this action, a labor organization and exclusive bargaining representative of the Plaintiffs.

6. That the Defendant Union entered into a Collective Bargaining Agreement on behalf of the Plaintiffs with Interstate Brands Corporation dated May 2, 1982.

7. That on or about February 19, 1983, Interstate Brands Corporation sold its bakery facility at 24th and Leavenworth Streets (sic) to the Defendant Metz Baking Company.

8. That on or about March 2, 1983, the Defendant Metz transferred its production facilities from its Nicholas Street plant to the 24th and Leavenworth Street plant.

9. That in March, 1983, when the Defendant Metz consolidated production at the Leavenworth Street plant, it layed-off more than forty of the Interstate employees by reason of Metz treating the former Interstate employees as new hires and placing them at the bottom of the seniority list.

10. That the Defendant Union never requested of the Defendant Metz at any time, negotiations with regard to the manner in which Metz compiled its seniority list and that the Defendant Union and the Defendant Metz at no time engaged in collective bargaining regarding the lay-offs of the Plaintiffs.

11. That a grievance was filed by the layed-off employees which alleged that the seniority provisions of the Collective Bargaining Agreement were unfairly and improperly implemented by Metz. That an arbitration hearing was held on April 26, 1983, before James A Doyle, arbitrator, appointed by mutual agreement of the Defendant Metz and Defendant Union.

12. That the arbitrator determined that the action of the Defendant Metz was proper and denied the grievance of the Plaintiffs.

13. That at the arbitration hearing the [written] agreement between Interstate Brands Corporation and Metz Baking Company dated February 19, 1983, was not introduced into evidence by either party to the arbitration.

14. That the nature and extent of the damages incurred by the Plaintiffs by reason of the action of the Defendants, if any, should not be tried to the Jury but should be determined by subsequent hearing before the Court.

CONTROVERTED OR UNRESOLVED ISSUES

1. Whether the meaning and legal effect of the Purchase Agreement between Defendant Metz and Interstate Brands Corporation constitutes a question of law not properly submitted to the jury.

2. Whether, at the arbitration hearing, the agreement between Interstate Brands Corporation and Metz Baking Company was accurately explained by the witnesses as to its content and the intention of the parties.

3. Whether the failure of the Defendant Union to submit the agreement between the Defendant Metz and Interstate Brands Corporation at the arbitration hearing, or the taking of a neutral position at the hearing, resulted in the Defendant Union breaching its duty of fair representation to the plaintiffs which resulted in prejudice to plaintiffs.

4. Whether the Defendant Union in failing to negotiate with the Defendant Metz with regard to the status of former Interstate Brands' employees upon sale of its facilities to the Defendant Metz violated its duty of fair representation to the plaintiffs under the National Labor Relations Act, as Amended. [which resulted in prejudice to plaintiffs.]

5. Whether the Defendant Metz, by reason of its agreement with Interstate Brands Corporation bound itself to assume and recognize all obligations of Interstate Brands Corporation to its employees under that company's Collective Bargaining Agreement.

6. Whether the Defendant Metz, if bound by the Collective Bargaining Agreement of Interstate Brands Corporation, layed-off the plaintiffs in violation of said agreement.

7. The nature and extent of the damages incurred by the plaintiffs by reason of the action of the defendants, if any, to be determined by subsequent hearing to the Court.

8. Whether a further arbitration constitutes the appropriate remedy. [This issue to be determined in a subsequent hearing to the Court.]

E. Elments of Proof.

Each party submits to the Court, by attachment hereto, its statement of the elements of proof of its own claims or affirmative defenses and the claims or affirmative defenses of each other party hereto.

F. Witnesses.

All witnesses whom the plaintiffs expect to call to testify, except those who may be called for impeachment purposes only, are:

Selman (Joe) Thomas, Jr.
David Bell
Dennis Canterbury
Curtis Cotton
Ressie Estell
Paul Flower
Donald Froien
Eddie Gill
Robert Hinsley
Josephine James
Ralph Johnson
Patricia Livengood
Percy Moore
Robert Peters
Sylvio Rebolloso
Wayne Shaffar
James Thompson
Clayton Welch
Gerald Carew
Melvin Wade, Jr.
Bernard Clausen
Marlin Lessman
Lloyd Anderson
Dale John Burk
John Conner
Michael DeJaynes
Robert Fillbach
David Foster
James George
Ivan Heesacker
Lewis Huston
Calvin Jewett
Kent Jorgensen
Clyde Moore
James Nash
John Pittman
Jane Reed
Paul Stone
James Walker
Ishanwee Wrenn
Thomas Hayden
James A. Doyle
Louis Church

All witnesses whom the Defendant Bakery, Confectionery and Tobacco Workers Union Local #433 expects to call to testify except those listed in the preceding as

expected to be called by the Plaintiff (sic), except those who may be called for impeachment purposes only are:

Bernard Clausen	Gary Wasinger
Louis Church	Bessie Sherrod
Karl Bonowski	Annie Moore
Barbara Griffin	[Harry Smith]

All witnesses whom the Defendant Metz Baking Company expects to call to testify except those listed in the preceding as expected to be called by the Plaintiff (sic), except those who may be called for impeachment purposes only are:

Marlin Lessman

G. Expert Witnesses.

None of the parties expect to call any expert witness with regard to this matter.

H. Depositions.

None of the parties expect to utilize any deposition except with regard to impeachment purposes.

I. Length of Trial.

Assuming that the case will be bifurcated with regard to damages which will not be tried to a jury, counsel estimates that the trial will consume not less than one and one-half days nor more than ~~three~~ [five] days and probably ~~two~~ [four] days.

/s/ C. Arlen Beam
Judge, U.S. District Court

APPROVED:

SELMAN (JOE) THOMAS JR., et al.

Plaintiffs,

By: /s/ Thomas J. Young
Thomas J. Young
#14645
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Tel: (402) 553-3535

ATTORNEY FOR PLAINTIFFS

METZ BAKING COMPANY,

Defendant,

By: /s/ Joe P. Cashen
Joe P. Cashen
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10306 Regency Parkway Drive
Omaha, Nebraska 68114
Tel: (402) 397-0203

ATTORNEY FOR DEFENDANT METZ BAKING COMPANY

BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL NO. 433,

Defendant,

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[MacDonald] ~~Harry H.~~ Smith
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632-640 Badgerow Building
Sioux City, Iowa 51101
Tel: (605) 336-1088

ATTORNEY FOR DEFENDANT BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL NO. 433

PLAINTIFFS' ELEMENTS OF PROOF

The elements of proof required by the Plaintiff with regard to the finding of liability against the Defendant Union is as follows:

1. That actions of the Defendant Union in investigating and processing the Plaintiffs' grievance up to and through arbitration were made without good faith and honesty of purpose or were made with hostile intent or in a discriminatory, arbitrary or perfunctory manner.

The elements of proof required by the Plaintiff with regard to the finding of liability against the Defendant Metz are as follows:

1. Finding of the liability with regard to the Defendant Union.
2. That the Collective Bargaining Agreement provided that the last person hired in the plant shall be the first person layed-off.
3. That utilizing plant-wide seniority, the Plaintiffs would not have been layed-off from their employment.

PLAINTIFFS' ELEMENTS OF PROOF IN REGARD TO THEIR CLAIMS AGAINST DEFENDANT UNION

1. That in regard to Defendant Union's investigation and processing of Plaintiffs' seniority claims and grievance or otherwise in their representation of Plaintiffs:

a. Defendant Union treated Plaintiffs and their claims discriminatory or with hostility; or

b. Defendant Union exercised its discretion in investigating and processing Plaintiffs' claims and grievance in bad faith or dishonestly, or

c. Defendant Union acted arbitrarily or in a perfunctory manner in its investigation and processing of Plaintiffs' claims and grievance.

2. That, if so, absent Defendant Union's conduct and actions in regard to Plaintiffs' claims and grieve (sic) either:

a. Defendant Metz would not have laid off Plaintiffs on March 8 and 22, 1983, or

b. Arbitrator Doyle would likely have sustained Plaintiffs' grievance.

APPENDIX L

IN THE MATTER OF ARBITRATION BETWEEN Metz Baking Company and The Bakery, Confectionary and Tobacco Worker's Union, Local No. 433	*Decision and Award*

The hearing in this matter was held on April 26, 1983 before James A. Doyle, Arbitrator, appointed by mutual agreement of the parties.

Appearances

For the Company

Joe P. Cashen, Esquire
Kennedy, Holland, Delacy & Svoboda
10306 Regency Parkway Drive
Omaha, Nebraska 68114

For the Union

Harry H. Smith, Esquire
632-640 Badgerow Building
Sioux City, Iowa 51101

Statement of Facts

The facts in this case are not in dispute. The Metz Baking Company, with its principal place of business in Sioux City, Iowa, operates bakery facilities in Sioux City, Omaha, and other locations in Nebraska, South Dakota, and Minnesota. The dispute in this proceeding involves its operations in Omaha, Nebraska. It's [sic] plant at 4383 Nicholas Street in Omaha produced and marketed under

the "Old Home" label. Its principal competitors in the Omaha area were the Interstate Brands Corporation, whose plant was located on Leavenworth Street, where bakery products were produced and marketed under the "Butter Nut" label; and ITT – Continental Baking Company, whose products bear the "Wonder Bread" label.

These baking companies are parties to an industry wide bargaining agreement with the Baking, Confectionery and Tobacco Worker's Union, Local No. 433, which represents employees engaged in the preparation, production, shipping, wrapping and packing of bakery products, and truck loaders and miscellaneous helpers.

In February 1983 the Metz plant on Nicholas Street was operating on a two and one-half shift basis with 78 full-time employees and 33 part-time employees. At the same time the Interstate Brands Corporation, with its principal place of business in Kansas City, Missouri, had 41 full-time employees and 21 part-time employees engaged in the production of bread and buns on a one shift per day basis at its plant on Leavenworth Street in Omaha. The Company was operating the plant at a substantial loss, which warranted a conclusion that if not disposed of, closure of the plant was probable, if not inevitable.

Sometime in January 1983 representatives of Interstate sought and entered into negotiations with representatives of Metz for the sale of its Omaha plant to Metz. Agreement was reached under the terms of which Metz acquired Interstate's plant, equipment, and its routes, but not its trucks. The sale was closed on February 19, and Metz took possession of the plant, equipment and routes

on February 21. The Union, it appears, was informed that the acquisition was being discussed, and if successful the two plants would be operated in tandem temporarily, its objective being to retain as much of the Butter Nut business as possible. After about two weeks of such tandem operation Metz closed its Nicholas Street plant and consolidated operations and equipment in the Interstate facility on Leavenworth Street because of its size and more modern equipment. The Nicholas Street plant was utilized thereafter as a truck storage facility.

In the move to the Interstate plant the reorganization resulted in the layoff of more than 40 of the employees on the Interstate seniority list. Metz treated the former Interstate employees as new hires and placed them at the bottom of the seniority list. However, the Company recognized their benefit rights under the industry contract, namely their accrued vacation rights, health and accident insurance benefits and pension rights. This reorganization gave preference to Metz employees with respect to job bidding, promotion, demotions, layoffs and recall rights.

The evidence establishes that during the first week of February 1983, production of bread and buns at the Metz plant amounted to 453,409 pounds, compared to 276,559 pounds produced at the Interstate plant. Based on these figures the production by Metz amounted to 62 percent of the combined production of the two plants.

A grievance was filed by the employees on the Interstate seniority list in which they alleged that the seniority provisions of the contract were unfairly and improperly

implemented by Metz. Restoration to their jobs in accordance with their seniority and with back pay was requested.

The Company's position is that in treating the employees of Interstate as new hires it was following its past practice and that of the industry. It supported this by testimony of numerous acquisitions of bakery routes by Metz from 1967 through 1980 in all of which the employees on such routes were considered as new hires. It contends that as the surviving company, and the largest of the two, to integrate the seniority lists would discriminate against loyal Metz employees, and confer a windfall on Interstate employees who were facing the probable loss of their jobs because of the financial condition of their employer.

The Union in this case has taken a neutral position because it is the bargaining representative of bakery employees under the identical contract signed by Metz and Interstate. Employees on the seniority list of Metz appeared and testified in support of the Company's action in treating Interstate employees as new hires. They argued that as employees of the surviving and dominant company they were following the work, and the integration of the Interstate employees on a one-to-one basis would be discriminatory and confer a windfall on the employees of a plant in a failing condition.

The Interstate employees, on the other hand argue that Metz agreed to assume the Union contract; the business is being carried on in the former Interstate plant; and it would be grossly inequitable to ignore their seniority rights. They argue that a fairer solution would

be the dovetailing of the two seniority lists. If dovetailing is not recognized, the minimal remedy should be entitlement to severance pay.

Statement of the Issue

The issue in this proceeding may be defined as follows:

> Did the Metz Baking Company violate the seniority rights of employees of the Interstate Brands Corporation when it acquired the assets of that Company, consolidated operations, and treated such employees as new hires. If so, what is the appropriate remedy?

Discussion

Arbitrators have wrestled with the problem of merging seniority lists in a wide variety of factual situations. In an effort to achieve an equitable solution involving a valuable contractual benefit, certain criteria for achieving that result have evolved. They have been identified as follows: 1) the surviving group principle; 2) the length of service principle; 3) the follow the work principle; 4) the absolute rank principle; and 5) the ratio rank principle. *Kennedy, Merging Seniority Lists,* BNA, *Labor Arbitration* and *Industrial Change,* 1963. What criterion will be found appropriate to achieve an equitable result will depend upon the particular facts and circumstances involved.

In approaching the issue in this case the following undisputed facts should be kept in mind.

First, Metz and Interstate are parties to the same bargaining agreement with Local No. 433 covering the

production employees. Plant wide seniority applies with respect to filling jobs, layoff, right to recall and other benefits. The contract does not contain any provisions defining the rights of employees if a plant is closed, or work is transferred from one plant or location to another, or what recognition, if any, shall be accorded employes if the employer disposes of its assets, or acquires the assets of another company by purchase, merger, or consolidation.

Second, the transaction between Metz and Interstate was a sale of assets to Metz, properly defined as an acquisition and not a merger or consolidation of the parties in the legal sense. There was, however, an economic consolidation of production operations in the larger and better equipped plant acquired by Metz.

Third, there was no agreement between the two companies with respect to the status of the Interstate employees upon the transfer of the assets of that Company to Metz.

Fourth, it appears that while negotiations for the purchase were in progress the Union, which represented both groups of employees, was informed by Metz that it intended to adhere to the practice followed in numerous prior acquisions of the routes of other companies, namely that the seller's employees would be regarded as new hires, with seniority dating from the date of acquisition. There is no evidence that the Union interposed any objection.

Fifth, it is uncontroverted that the Omaha plant of Interstate was in deep financial trouble, and faced probable liquidation if a sale could not be consummated.

We start with the legal premise, that seniority rights exist only by virtue of and to the extent provided by a bargaining agreement. *U.A.W. vs. Robertshaw Controls, Co.*, 405 F2d 29 (1968); *Interscience Encyclopedia, Inc.* 55 LA 210 (1970).

Of the criteria, which have evolved in dealing with the seniority right of the predecessor's employees in such cases, the Metz employees support the surviving group principle applied by the Company; and the Interstate employees advocate the application of the length of service principle to mitigate the inequity that is the result of tail-ending such employees. In other words, as the successor to Interstate, Metz should recognize their accrued length of service by dovetailing the two seniority lists. The rival positions of the two groups of employees is perfectly understandable. A review of a few arbitral decisions may help to place the issue in perspective.

In *Hubacker Cadillac, Inc.*, 57 LA 227 (1971), a case quite similar on its facts with the instant one, Hubacker bought the assets of another dealer. Both were parties to an industry wide contract. Upon transfer of the assets Hubacker did not recognize the vacation benefits accrued by the seller's employees under the Contract. The Union argued that the assets acquired by the seller included the seniority, stability and general productivity of the predecessor company. Arbitrator Updegraff answered this argument as follows:

> "The law seems to be well settled that there is no rule, principle or policy requiring an owner to agree to a substantive contractual provision obligating himself to be liable because of the seniority of the employee earned under another

> employer unless the later employer expressly obligates itself by an agreement."

There is no evidence of such an agreement with the Union in the instant case.

In a more recent case, *Weber Truck and Warehouse*, 66 LA 1029, the bargaining agreement to which they were subject contained a provision to the effect that if the employer absorbs the business of another Company or is a party to a merger, the seniority of the employee absorbed or affected shall be determined by mutual agreement between the employer and the Union involved. Failing to reach agreement arbitration was invoked. The Union contended that the employees affected by the acquisition were entitled to benefits accrued under the contract with the former employer but should be end-tailed for job security purposes. The surviving employer considered the employees of the seller as new employees and they were terminated during the probationary period. The arbitrator reached the following conclusion:

> "In the opinion of this Arbitrator and based on the weight of arbitral decision as well as the specific language of the Agreement, it would be improper to impose seniority obtained with one company and the benefits related thereto on another Company and its employees. The affected Davis employees shall have company seniority from the date of their employment by the Company."

The Arbitrator however, awarded the employees benefit rights (in this case vacation rights) accrued as employees of the predecessor.

Another recent case, *Carling National Brewers, Inc.*, 71 LA 476 (1978), involved the closing of a plant (Dillon) acquired three years earlier when Carling consolidated with the National Brewing Company. When the Dillon plant was closed the Company stated there would be openings for nine machinists at its Beltway plant and agreed to fill the openings with the nine most senior machinists at Dillon, integrating them on the seniority list on a one-to-one basis, the "absolute rank" method. The Union which represented employees at both plants under separate contracts objected on the ground that it would abrogate the seniority rights of Beltway employees. The Contract covering the Beltway plant did not deal with the question of seniority when production at two plants was consolidated, and there was no contract language supporting a merger of seniority lists on a "one-to-one" basis. If applied it would have resulted in a layoff of some Beltway employees. The Arbitrator concluded that under the circumstances the Company could not merge the seniority lists on the basis proposed. In support of his conclusion he cited *U.A.W. vs Robertshaw*, cited above, which held that in the absence of contract seniority rights generally do not survive a change in plant location. Although not specifically apposite to the facts in the instant case, the principle applied is not irrelevant.

Otto Milk Co., 51 LA 408 (1967) is an example of a case in which the merging companies were subject to identical contracts which addressed the problem faced here. The labor agreement provided that if the employer sells his entire business, or a part thereof, to another employer, the employees of the seller shall retain one half

of their seniority provided they have been in the employ of the seller of (sic) at least two years.

A case quite similar in many respects to the instant case is *Associated Brewing Co.* 40 LA 680 (1963). All of the Detroit brewery companies were parties individually to a uniform agreement with three Brewery Workers Locals in Detroit. Pfeiffer Brewing Co. and E & B Brewing Company merged under the name of Associated Brewing Company. Pfeiffer was the larger of the two and E & B was experiencing economic difficulties. With respect to the status of the employees of the two companies, the three local unions representing brewery workers in Detroit unanimously recommended dovetailing the two groups of employees. A small group of dissident employees adversely affected by the plan objected and the merged company and the Unions agreed to arbitration to afford those employees an opportunity to be heard. The Arbitrator held that dovetailing the lists was the most equitable way since the successor company continued to produce and market the brands of beer produced by Pfeiffer and E & B.

A reference to *Country Belle Cooperative Farmers,* 48 LA 60 involving a plant acquisition will conclude this review of arbitral decisions. The acquiring company proposed to integrate the employees on a one-to-one basis. The union objected, contending the non-union employees of the predecessor must go to the bottom of the list. The contract between the company and the Union was silent on the issue. The Arbitrator pointed out that the purchase involved a going enterprise and in balancing the equities of the two groups the employees of the acquired company should retain one half of their original seniority

provided they had been in the employ of the seller for at least two years.

In *N.L.R.B. vs Burns International Security Services,* 406 US 272 (1972) the question was whether in the case of an acquisition of assets or merger of two employers and the same operations are continued, the successor must take over the obligations of the predecessor's bargaining agreement. In overruling the N.L.R.B.'s decision that such obligations survived and bound the successor employer, the Supreme Court stated:

> "Such a duty does not, however, ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employer (sic) as his predecessor. . . .
>
> "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, work location, task assignment and nature of supervision. Saddling an employer with the terms and conditions contained in the old collective bargaining contract may make those changes impossible and may discourage and inhibit the transfer of capital."

This case and others make clear that the application of the so-called "successorship" doctrine will depend upon the circumstances of each case.

This Arbitrator has concluded that Metz, as purchaser of most, but not all, of the assets associated with Interstate's plant in Omaha, was not bound under the facts and circumstances to assume or recognize any obligations to Interstate employees under that Company's

bargaining agreement. The industry agreement, to which each subscribed made no provision for such an event. Although Metz agreed to recognize benefit rights which employees of Interstate had accrued prior to the transfer, it had informed the Union representing both groups of employees that those employees it might need in the enlarged operations would be recorded as new hires. The Union did not object and seek arbitration of the issue, as the Supreme Court has held it might have done. *John Wiley & Sons vs Livingstone,* 84 S.Ct. 909. Furthermore, this is not a case involving the acquisition of a thriving business, but on the contrary, a failing enterprise. Prospects of continued employment were bleak. Integration of Interstate employees on the seniority list by dovetailing would have resulted in the layoff of approximately three times as many Metz employees as former Interstate employees. Although it is difficult to achieve complete equity in merging seniority lists under any of the methods that have evolved, the hardship imposed on Metz employees would be severe and disruptive of harmonious labor relations. This Arbitrator is not unmindful of the fact that the surviving-group principle necessarily works severe hardship on the employees of the financially troubled seller, but in the absence of the sale the probability of loss of jobs by attrition and ultimate closing of the plant was imminent. Finally, the fact that Metz agreed to assume the obligations attributable to benefit rights accrued by Interstate employees under the contract negates any intention to assume other obligations under the old contract, including the grant of severance pay requested as a minimal remedy. Metz's action was in

accord with the Company's prior practice, and not in opposition to industry practice.

Award

The grievance is denied.

Dated this 7th day of June 1983.

/s/ James A. Doyle
Arbitrator

APPENDIX M

* * *

§ 8. National Labor Relations Act

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within [the sixty-day] ANY NOTICE period specified in this subsection, OR WHO ENGAGES IN ANY STRIKE WITHIN THE APPROPRIATE PERIOD SPECIFIED IN SUBSECTION (g) OF THIS SECTION shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for

such employee shall terminate if and when he is reemployed by such employer, WHENEVER THE COLLECTIVE BARGAINING INVOLVES EMPLOYEES OF A HEALTH CARE INSTITUTION, THE PROVISIONS OF THIS SECTION 8(d) SHALL BE MODIFIED AS FOLLOWS:

(A) THE NOTICE OF SECTION 8(d)(1) SHALL BE NINETY DAYS; THE NOTICE OF SECTION 8(d)(3) SHALL BE SIXTY DAYS; AND THE CONTRACT PERIOD OF SECTION 8(d)(4) SHALL BE NINETY DAYS.

(B) WHERE THE BARGAINING IS FOR AN INITIAL AGREEMENT FOLLOWING CERTIFICATION OR RECOGNITION, AT LEAST THIRTY DAYS' NOTICE OF THE EXISTENCE OF A DISPUTE SHALL BE GIVEN BY THE LABOR ORGANIZATION TO THE AGENCIES SET FORTH IN SECTION 8(d)(3).

(C) AFTER NOTICE IS GIVEN TO THE FEDERAL MEDIATION AND CONCILIATION SERVICE UNDER EITHER CLAUSE (A) OR (B) OF THIS SENTENCE, THE SERVICE SHALL PROMPTLY COMMUNICATE WITH THE PARTIES AND USE ITS BEST EFFORTS, BY MEDIATION AND CONCILIATION, TO BRING THEM TO AGREEMENT. THE PARTIES SHALL PARTICIPATE FULLY AND PROMPTLY IN SUCH MEETING AS MAY BE UNDERTAKEN BY THE SERVICE FOR THE PURPOSE OF AIDING IN A SETTLEMENT OF THE DISPUTE.

Supreme Court, U.S.
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No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONARY & TOBACCO WORKERS UNION LOCAL #433 and CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

INTERVENORS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS ADMINISTRATIVE AGENCIES

The list set out below is in addition to and supplemental to the lists of all other parties and is given with the intention of providing added sources:

1. Arbitrator's Award by James A. Doyle dated December 15, 1983 titled *Interstate Brands Corporation and Bakery Confectionery and Tobacco Workers Union, Local No. 433* covering severance pay. (Referred to hereinafter as "Doyle II."
2. Memorandum Opinion of the District Court (unreported) dated September 9, 1985 delivered by Senior Judge Richard Robinson titled *Selman (Joe) Thomas, Jr. et al., Plaintiffs v. Interstate Brands Corporation, et al., Defendants,* Civil No. 83-0-560
3. Pretrial Order dated April 10, 1985 in the above case.

STATEMENT OF THE CASE

The Intervenors' Statement of the Case will supplement the other parties' Statement of the Case and will provide facts not otherwise disclosed.

Prior to the first trial in this case, James A. Doyle rendered an arbitration award (Doyle II) granting the Plaintiffs severance pay related to service with Interstate Brands Corporation, their employer prior to Metz. (App. A) The Plaintiffs filed an action in the United States District Court for the District of Nebraska, Civil No.

83-0-560 seeking a resolution of five issues spelled out in the Pretrial Order related to the Doyle II arbitration. (App. B) Senior Judge Richard Robinson rendered a Memorandum Opinion filed on September 15, 1985 concluding that Metz was entitled to a receipt and determined that the receipt required by Metz "does not release all of plaintiffs' rights against Metz." (App. 37) The determination of the effect of taking severance pay from Interstate Brands Corporation for service with Interstate Brands Corporation was left to this case. Doyle II was not attacked by any party. The issue of the effect of the receipt of severance pay was left up to Judge Strom and his interpretation of the collective bargaining agreement.

The Petitioners received all their severance pay from Interstate Brands service *and* Metz service prior to filing this case. The case was tried to Judge Strom and the above evidence was presented along with the receipts of the Plaintiffs for severance pay for *both* Interstate Brands *and* Metz work.

ARGUMENT

I. METZ, THE UNION, AND THE INTERVENORS DID NOT BREACH THE SENIORITY AND RECALL PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENTS WITH METZ AND INTERSTATE BRANDS, BECAUSE THE PETITIONERS REQUESTED THROUGH ARBITRATION, AND OBTAINED THROUGH COURT ACTION, SEVERANCE PAY FOR TIME SERVED UNDER *BOTH* THE INTERSTATE BRANDS AND METZ CONTRACTS, THUS CONTRACTUALLY BARRING ANY CLAIMS FOR LOSS OF SENIORITY OR JOBS AND ANY DAMAGES RELATED THERETO.

A Brief in Opposition to a Petition for Writ of Certiorari must correct perceived misstatements of fact and/or law or waive them. Supreme Court Rule 15.

The Petitioner implies in Argument I of his brief, that if the collective bargaining agreements were enforced, that there would be damages for Plaintiffs' loss of seniority, recall rights, pay and fringe benefits. That is neither legally nor factually correct for the reasons specified herein.

James A. Doyle actually held two arbitrations. The second arbitration decision dated December 15, 1983 gave severance pay to the Plaintiffs for time worked for Interstate Brands Corporation. (App. 23) The Plaintiffs were ably represented by Dayton O. Rasmussen, Esquire, their attorney. Following the decision, Metz wanted a release if they paid severance pay to the greivants. Dayton O. Rasmussen filed an action in the United States District Court for the District of Nebraska. The pretrial Order

(App. B) listed five issues. On September 15, 1985, Senior Judge Richard Robinson rendered a Memorandum Order finding that Doyle II would be enforced but that only a receipt would be required and that the receipt "does not release all of the Plaintiffs' rights *against Metz*." The Court did not explain what rights were not released or whether rights were released against the Union or the Intervenors. Evidently, this would be left up to the Trial Judge, Chief Judge Lyle Strom, in this case.

Upon trial of this case, evidence showed that the Plaintiffs accepted severance pay for time worked for *both* Metz and Interstate Brands. The collective bargaining agreement (App. 88) provides that acceptance of severance pay forfeits seniority and recall rights. (Article XXXIV, Section 2(f)). If the Plaintiffs do not have Metz and/or Interstate Brands Corporation seniority and recall rights, they cannot outbid the Intervenors for jobs and would not be entitled to damages for loss of jobs they were not entitled to in the first place.

The district Court determined, however, that a vote should have taken place and that damages were due until the vote would have taken place settling the seniority issue. The Intervenors concede that this remedy is an alternative remedy well established by the National Labor Relations Board. See *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. National Labor Relations Board v. Tiidee Products, Inc.*, 426 F.2d 1243, 73 LRRM (BNA) 2870, 75 LRRM (BNA) 2350, 138 U.S. App. D.C. 249, U.S. Court of Appeals, District of Columbia (1969). Rehearing was denied by *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 1970 WL 2763, 63 Lab. Cas. ¶11,174 (D.C. Cir. 9/21/70).

Certiorari was denied by *Tiidee Products, Inc. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed. 2d 256, 75 LRRM (BNA) 2752, 64 Lab. Cas. ¶11,310 (12/7/70). The case was appealed after remand. *International Union of Electrical, Radio, and Machine Workers, AFL-CIO v. NLRB*, 502 F.2d 349, 86 LRRM (BNA) 2093, 87 LRRM (BNA) 2255, 163 U.S. App. D.C. 347, 73 Lab Cas. ¶14,482, 74 Lab. Cas. ¶10,280 (4/25/74). Certiorari was denied by *Tiidee Products, Inc. v. NLRB*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed. 2d 226, 86 LRRM (BNA) 2427, 74 Lab. Cas. ¶10,057, 75 Lab. Cas. ¶10,338 (5/28/74). Certiorari was denied by *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed. 2d 226 (5/28/74). Certiorari was denied by *Tiidee Products, Inc. v. NLRB*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed. 2d 481, 89 LRRM (BNA) 2358, 77 Lab. Cas. ¶10,875 (5/27/75). A further case related thereto is cited as *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 440 F.2d 298, 76 LRRM (BNA) 2109, 142 U.S. App. D.C. 270, 64 Lab. Cas. ¶11,370 (12/23/70). There was an appeal after remand, cited as *International Union of Electrical, Radio, and Machine Workers, AFL-CIO v. NLRB*, 502 F.2d 349, 86 LRRM (BNA) 2093, 87 LRRM (BNA) 2255, 163 U.S. App. D.C. 347, 73 Lab. Cas. ¶14,482, 163 U.S. App. D.C. ¶14,482, 74 Lab Cas. ¶10,280 (4/25/74). Certiorari was denied in *Tiidee Products, Inc. v. NLRB*, 417 U.S. 921, 94 S. Ct. 2629, 41 L.Ed. 2d 226, 86 LRRM (BNA) 2427, 74 Lab. Cas. ¶10,057, 75 Lab. Cas. ¶10,338 (5/28/74). Certiorari was denied by *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed. 2d 226 (5/28/74) and by *Tiidee*

Products, Inc. v. NLRB, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed. 2d 481, 89 LRRM (BNA) 2358, 77 Lab. Cas. ¶10,875 (5/27/75). In the first case cited in the series, the Board determined damages based on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer had not yet entered into the contract. The United States Court of Appeals for the District of Columbia stated:

> *"We reiterate that damages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer had not yet entered into the contract." International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB v. Tiidee Products*, 426 F.2d 1243, *supra*, at 1253.

The D. C. Circuit used the hypothetical contract to determine damages and not as a collective bargaining agreement thus getting around the National Labor Relations Act bar on agencies forcing contracts between labor and management.

In this case, the Eighth Circuit Court of Appeals affirmed that finding of Judge Strom in finding that the appropriate remedy would be to look to a vote based upon affidavits of bargaining unit members to access damages. The Eighth Circuit was satisfied with the evidence demonstrating the outcome of the vote and thus the hypothetical agreement produced with the Union and Metz. That factual finding is not clearly erroneous and has not been appealed. So we are not faced with continual appeals in *Tiidee Products* involving proof of what the

contract would be. We can thus rely on the trial court's, circuit's and Supreme Court's determination of the law thereon in *Tiidee Products* that damages can be awarded based on the assessment of contract terms that would have been in effect if the law had been complied with. And can also rely on the determination of Judge Strom, the trial judge, as to what seniority provisions would be in a contract if a vote were taken. Thus, the Plaintiffs have neither seniority nor recall rights; the Plaintiffs have no loss; and the Plaintiffs have no damages.

In the Petition for Certiorari, however, the Plaintiffs state that the current collective bargaining agreement should have been enforced without using a hypothetical vote to determine what the new contract would be and if that were the case, more damages should be assessed.

The Intervenors argue *first* that the Eighth Circuit Court of Appeals took the right approach in finding:

> *"In light of our decision, it is unnecessary to address the arguments of the Intervenors. Our affirmance of the merits of the main appeal necessarily means that plaintiffs have no seniority rights superior to those of the intervening group of Metz employees.*
>
> *Affirmed."*

See *Thomas et al. v. Bakery, Confectionery and Tobacco Workers International Union, Local #433 and Metz Baking Company v. Curtis Barton et al.*, 982 F.2d 1215, 1220, (C.A. 8, 1992). Thus if the Plaintiffs do not have seniority, they do not have the jobs or damages after the vote.

The Intervenors argue *second* that even if the trial court and the circuit court were wrong, that there would be no damages due since the Plaintiffs lost no rights to jobs. The Plaintiffs gave those rights up on accepting severance pay for both Interstate Brands *and* Metz

employment. Basically without legal harm, there can be no damage.

Doyle II is *res judicata* as an arbitration award. See *St. Louis Typographical Union No. 8, AFL-CIO, Appellants v. Heard Company d/b/a Globe-Democrat Publishing Company, Appellee*, 402 F.2d 553 (C.A. 8, 1968) and *Leicht v. Commission of Internal Revenue*, 137 F.2d 433 (C.A. 8, 1943). Judge Robinson left open the issues of the effect of the receipt on *Metz*. Judge Robinson did not determine the effect of the receipt on the Union (or for that matter the Intervenors). But, since that issue could have been litigated and was not, one can refer to the doctrine of *res judicata* and thus assume that the Union and the Intervenors could rely on the receipt and the contract to bar seniority and recall rights.

The Circuit Court determined that the Intervenors had seniority greater than the Plaintiffs. If that award was not appealed, then that award is *res judicata* for the Intervenors relative to the Plaintiffs. The Questions Presented for Review by the Petitioner do not disclose any issue related to the Intervenors' superior seniority rights. If the Intervenors have superior seniority, then the Plaintiffs have no right to the jobs and suffer no loss.

In summary, based upon the application of the doctrine of *res judicata* even if the theory of the Circuit and the trial court were incorrect, the Plaintiffs have no right to the jobs and, thus, no loss. Whether one looks to the period after the hypothetical vote and finds no loss of seniority after the vote and thus no damage after the vote, or, determines that severance pay forfeits seniority from the date of hire, then under either scenario, there is

no right to jobs and no loss from and after the date of a vote. In either event, the Circuit and the trial court were correct.

II. THE ARGUMENT OF PLAINTIFFS AS TO THE EFFECT OF THE RECEIPT DOES NOT BIND THE INTERVENORS.

The joint stipulation of the Plaintiffs, Metz, and the Union, in Civil No. 83-0-560 does not bind the Intervenors and was superseded by the Intervenors' amended pleadings and the Pretrial Order for the remedies trial in this case.

The Intervenors are not parties to the Stipulation in Civil No. 83-0-560 and are not bound to it. *Kneeland v. Luce, et al.*, 141 U.S. 437, 12 S. Ct. 39 (1891); *Raylite Electric Corp. v. Noma Electric Corp.*, 190 F.2d 914 (C.A. 2, 1948); *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141 (C.A. 2, 1977); and *LaRouche v. Federal Bureau of Investigation*, 677 F.2d 256 (C.A. 2, 1982). See also *Secretary of Labor v. International Brotherhood of Teamsters*, 805 F.2d 682 (C.A. 7, 1988). The Eighth Circuit has ruled that a stipulation is not binding on a non-participating third party defendant. See *Gall v. South Dakota National Bank of South Dakota of Sioux Falls, South Dakota*, 783 F.2d 125 (C.A. 8, 1986).

As far as the Intervenors go, the receipt is a release of rights under Article XXXIV, Section 2(f) of the contract. As such, the Plaintiffs cannot outbid the Intervenors for jobs and have no jobs or damages for loss of jobs.

The Intervenors have consistently affirmatively defended this case on the theory that the Plaintiffs have no loss because they lost their seniority and thus their

jobs by accepting severance pay. The Intervenors feel that if the Plaintiffs rely on the collective bargaining agreement they are no better off than the award of the trial court and the circuit court and in all likelihood would and should be worse off because under the severance pay argument, there are no damages owed after the date of hire because seniority was retroactively forfeited.

III. THE PETITIONERS CANNOT NOW CLAIM THAT AN ACTUAL VOTE IS NEEDED BECAUSE NO EVIDENCE ON THE RECORD SHOWS (1) THAT THEY ASKED FOR AN ACTUAL VOTE; (2) WERE IMPROPERLY DENIED AN ACTUAL VOTE; OR (3) THAT THEY EVER ARGUED FOR AN ACTUAL VOTE AS A REMEDY IN THIS PROCEEDING.

Once the Petitioners realize that enforcing the collective bargaining agreement will put them in a worse position relative to overturning the decision of the trial court and the circuit court, then their next step will be to request an actual vote as a remedy and claim damages to the date of such vote if it is negative. Or, in the alternative, claim damages until the next succeeding collective bargaining agreement was signed approving the new seniority lists. The alternative position is not realistic for not one Petitioner ever requested arbitration over losing a job assignment. Under the contract (Article X, Section 1, *Seniority*) and the arbitration procedures (Article VI, Section 1, *Arbitration*), if there was no grievance made within seven days stating that the Petitioner/candidate had higher seniority *and* was qualified, then the grievance would be gone and the job award valid. Without any

Petitioner grievances, we can assume no job losses during the initial contract period. Thereafter, the Union accepted by actual vote the new agreement incorporating the new seniority lists which were put into evidence by the Intervenors. So not only could the Petitioners not argue that they had damages through the first contract period, but then, after the *actual* Union vote on the succeeding contract, they could not argue damages since the new seniority lists were approved by all voters entitled to vote under the Union Constitution and By-Laws (also in evidence).

But, for the sake of argument, let us state that the grievance procedures were all tainted (which the Intervenors in light of the Court approval of Doyle II do not concede), and, that the Union improperly refused a vote (which the evidence does not support), then the Petitioners argue an actual vote should have taken place.

The only problem with the approach was that the Petitioners never plead nor proved such a violation or violations and never requested such a remedy.

In absence of exceptional circumstances not argued herein, the Petitioners cannot raise an issue at the appellate level that was not raised below. See *Hormel v. Helvering*, 312 U.S. 552, 61 S. Ct. 719, 85 L.Ed. 1047 (1941) upholding the result in *Hormel v. Helvering*, 111 F.2d 1 (C.A. 8, 1940); *Trapp v. Metropolitan Life Insurance Co.*, 70 F.2d 976 (C.A. 8, 1934); *United States v. Latrobe Construction Company*, 246 F.2d 357 (C.A. 8, 1957); and *Jones v. State of Arkansas*, 929 F.2d 375 (C.A. 8, 1991).

The Petitioners could have obtained an actual vote under the Union Constitution and By-Laws and enforced

that right in a 301 action. *Woodell v. International Brotherhood of Electrical Workers, Local 71*, 112 S. Ct. 494, 116 L.Ed.2d 419, 60 U.S.L.W. 4024, 138 LRRM (BNA) 2881, 120 Lab. Cas. ¶11,010 (1992); *Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated*, 945 F.2d 889, 60 U.S.L.W. 2243, 138 LRRM (BNA) 2433, 120 Lab. Cas. ¶10,972, *cert. den.*, 112 S. Ct. 1951, 118 L.Ed. 2d 555, 60 U.S.L.W. 3701, 60 U.S.L.W. 3775, 60 U.S.L.W. 3780, 140 LRRM (BNA) 2320, 121 Lab. Cas. ¶10,165 (1992).

The Petitioners did not request a vote, or, even if they had, they did not request a remedy of an actual vote and cannot do such at this late date.

CONCLUSION

The Intervenors pray that the Court determine that the Plaintiffs have no seniority or recall rights under the collective bargaining agreement to support their claim for remedy, and based upon such a finding deny the Petition for Writ of Certiorari, or, alternatively uphold the remedy determined by the trial court and the circuit court as being correct and deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMANY, BAKERY, CONFECTIONARY & TOBACCO WORKERS UNION LOCAL #433 and CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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C. Memorandum Opinion (September 15, 1985) *Selman (Joe) Thoams, Jr., et al. v. Interstate Brands Corporation, et al.*..... App. 33

D. Agreement between Metz Baking Company, ITT Continental Baking Company and Interstate Brands Corporation and Bakery, Confectionary and Tobacco Workers Union, Local No. 433 (1983)..... App. 47

IN THE MATTER OF ARBITRATION BETWEEN Interstate Brands Corporation and Bakery, Confectionery and Tobacco Workers Union, Local NO. 433	Grievance: Severance Pay Decision and Award

The hearing in this matter was held in Omaha, Nebraska, on October 6, 1983 before James A. Doyle, Arbitrator, appointed by mutual agreement of the parties.

Appearances

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Statement of Facts

A statement of the facts leading to this proceeding will provide a frame of reference for a definition of the issues submitted to this Arbitrator for final decision.

On February 19, 1983 the Metz Baking Company, Sioux City, Iowa, entered into a contract with Interstate Brands Corporation for the acquisition of its plant, located at 2215 Leavenworth Street, Omaha, Nebraska, and also the routes associated with that plant, where it produced bakery products under the Butternut label. Metz also owned and operated a similar plant at 4383 Nicholas Street, in Omaha, where it produced bread and other bakery products under the Old Home label. At the time of this acquisition (not a merger or consolidation) Interstate had 41 fulltime and 21 parttime employees on the payroll in Omaha. Metz took possession of the Interstate plant on February 21.

Metz and Interstate were parties to identical industry wide collective bargaining agreements with the Bakery, Confectionery and Tobacco Workers Union, Local No. 433. The Union, it appears, was informed that the acquisition of the Interstate facility was in the course of negotiations and, if successful, it understood that the two plants would be operated in tandem. The purchase agreement provided that Interstate employees primarily engaged in the Company's operations in Omaha shall become employees of Metz on the date of the transfer of possession. Metz expected to operate the two plants for a period of six or eight weeks, but early in that period it decided that the former Interstate plant on Leavenworth street was not only more efficient but also better equipped than its Nicholas Street plant, and after two weeks it closed the latter except for truck storage. It consolidated the production of basic bakery products under the Old Home label in the Leavenworth plant.

In effecting this consolidation of operations former Interstate employees were treated as new hires. Metz employees received preference for available jobs on the basis of their seniority. The reorganization resulted in the layoff of about forty employees on the Interstate seniority list. Metz, however, recognized the benefit rights of such employees, namely, their accrued vacation rights, health and accident benefits and pension rights which they had accrued under the terms of the Bargaining Agreement.

A grievance was filed by employees on the Interstate seniority list in which they alleged that the seniority provisions of the contract were unfairly and improperly implemented by Metz. The Union assumed a neutral position and represented both groups of employees in the arbitration proceeding that followed. Restoration to their jobs was sought in accordance with their seniority at the time of the sale of the Interstate plant. The sole issue in that proceeding was defined as follows:

> Did the Metz Baking Company violate the seniority rights of employees of the Interstate Brands Corporation when it acquired the assets of that Company, consolidate operations, and treated such employees as new hires?

On June 7, 1983 this Arbitrator denied the grievance and upheld the Company's action in relegating the former Interstate employees as new hires to the bottom of the Metz seniority list in the absence of any agreement to the contrary.

On July 29, 1983, thirty-six of the former employees of Interstate, as individuals filed an action in the United

States District Court, District of Nebraska, against Interstate Brands Corporation and Bakery, Confectionery and Tobacco Workers Union. The substantive allegations of the complaint relevant here are as follows:

> Article 34 of the Bargaining Agreement provides for payment of severance pay to an employees who is displaced from employment by reason of a closing of an entire plant and who has been employed for a period of three years. The sale of the plant in Omaha by IBC to Metz Baking Company is a "closing" within the meaning of Art. 34, Sec. 1 of the agreement, which entitles plaintiffs to said severance pay on the date of sale on February 19, 1983. None of the exceptions of Art. 34, Sec. 2 apply to any of the Plaintiffs.
>
> Defendant IBC cannot transfer its obligation for severance pay under its contract with these employees through the device of a sales agreement with Metz. For a novation of such a contract to occur, there must be agreement thereto by all three parties concerned. There exists no such agreement.

As an affirmative defense to the issue raised by such allegations the Union relies upon the provisions of Article VI of the Collective Bargaining Agreement which states that a dispute between the Union and the Employer with reference to the proper interpretation or application of the provisions of the contract shall be referred to arbitration. The filing of a grievance by the Union invoked this proceeding, to which Interstate interposed no objection.

Section XXXIV of the Bargaining Agreement which is the subject of interpretation in this proceeding provides as follows:

Article XXXIV

Severance Pay

Section 1. It is agreed that each regular full time employee who is displaced from his or her employment by reason of the closing of an entire plant, or the introduction of labor saving equipment, shall be compensated for such displacement providing they have been actively employed by the Employer for a period of at least three (3) years. An eligible employee's compensation for their displacement shall be on the basis of thirty (30) hours of severance pay (at their straight time hourly rate of pay) for each full year of actual employment, commencing with the fourth (4th) year thereof. Payment under this formula shall be limited to a maximum of nine hundred (900) hours severance Pay.

Section 2 The above described Severance Pay will not be paid to:

1. Any employee who is offered employment with the Company in another plant or the Employer which is located within a reasonable distance from the employee's place of employment.

2. Any employee who accepts a job with the Company at any location.

3. Any employee who voluntarily quits or is discharged for just cause before he is separated from employment by the Company.

4. Any employee, who at the time of separation, is eligible for a Normal Pension, as provided for under the provisions of the

Bakery and Confectionery Union Local 433 Industry Pension Fund.

5. If an employee subject to Severance Pay is eligible to receive an early retirement or disability pension benefit under the Bakery and Confectionery Workers Union Local #433 Industry Pension Fund, whether or not he or she elects to accept such early retirement or disability benefits, he or she shall receive as severance pay that percentage of severance pay as set forth above which the excess of the Normal Pension Benefit under such Pension Plan over the amount of early retirement or disability benefit, to which he or she is then entitled bears to the Normal Pension. For example, if the Normal Pension Benefit is $100.00 and an employee is entitled to an early retirement or disability benefit of fifty-eight dollars ($58.00), then his or her severance pay will be reduced by fifty-eight percent (58%).

6. Any employee accepting Severance Pay shall forfeit and cease to have any seniority and recall rights as provided by in this Agreement.

7. Any employee re-employed after receiving Severance Pay shall be considered a new employee form the date of re-employment.

8. In the event an eligible employee wishes to remain on the plant seniority list, for the purpose of possible recall, he or she may elect or defer acceptance of his Severance Pay for a period of twelve (12) month. At any time during such period, however, he or she may request their Severance Pay and

their right of recall and seniority shall terminate as of that date.

9. If any such employee has not been recalled by the end of such period, he or she shall be paid Severance Pay and their right or recall and seniority shall terminate as of that date.

The main issue for resolution and final decision by this Arbitrator is as follows:

> Did Interstate Brands Corporation violate Section 34 of the Bargaining Agreement by its refusal to grant Severance Pay to employees at its Omaha plant upon the sale of that plant to Metz Baking Company and the transfer of its employees to that Company? If so, what is the appropriate remedy?

Provisions of the Agreement of Purchase and Sale of Assets to which reference is made as having some relevance to the issue are as follows:

> Section 10 – Transferred Employees
>
> 10.1 – All of Seller's employees who are primarily engaged in the conduct of the Subject Operations as of the Transfer Date shall become employees of Buyer on the Transfer Date (the "Transferred Employees"), and Buyer shall become the successor employer under, and shall use its best efforts to obtain novations with respect to each of the collective bargaining agreements identified in Exhibit D hereto. Seller agrees to make full and final settlement with the Transferred employees, as of the Transfer Date, with respect to wages, salaries, union dues, contributions to welfare and employee benefit plans, payroll taxes, premium pay and all other obligations relating to their employment by

Seller, to and including the Transfer Date, except for the accrued vacation rights, if any, of the Transferred Employees, which rights Buyer agrees to recognize and honor subsequent to the Transfer Date, and except for contingent work week credits not yet due and payable. At such time as contingent work week credits become fully earned, by and payable to, the Transferred employees, Buyer shall pay the same and shall prepare a schedule, on an individual employee basis, of the amount of work week credit payable to each of the Transferred Employees and deliver such schedule to Seller. Seller shall promptly verify the amounts due the Transferred Employees and pay to Buyer the amount of such work week credits payable to the Transferred Employees which related to periods on or prior to the Transfer Date.

10.3 – Notwithstanding the foregoing, in the event that any claim is made against Seller, by reason of Seller having been a party to any of the collective bargaining agreement identified in Exhibit D hereto, or for severance or termination pay under or pursuant to any of said agreements by reason of the transfer of any employees to Buyer, the termination of any of the Transferred Employees by Buyer or the termination of any employees by Seller at a request of Buyer, Buyer shall indemnify and save Seller harmless from and against all such claims, including all costs and expenses of defending against any such claims and any and all liabilities arising therefrom. Nothing contained therein shall be deemed or construed to require Buyer to continue to employ any of the Transferred Employees during any period following the Transfer Date.

Position of the Parties

The Union contends that Article XXXIV, Severance pay, is clear and unambiguous. The Interstate Brand employees have been displace from their employment with Interstate. Interstate has closed its entire plant in Omaha. The Company has not offered such employees employment in any other Interstate Plant, and none of such employees has quit or been discharged for cause. The fact that some, but not all, were employed by Metz is irrelevant and immaterial. Metz was not under any obligation to employ any of the Interstate employees under the contract of acquisition.

The basic position of Interstate Brands is that the Leavenworth plant was not closed by either the seller or the buyer. The transaction involved a disposition of assets which would not result in the closing of that plant or result in a displacement of employees which would trigger possible claims for severance pay. The contract involved a transfer of its employees to the buyer and under the Bargaining Agreement Article XXXIV would apply only in the event of the physical closing of the Leavenworth Plant. It argues that the severance pay clause has reference to the "closing" of a plant as distinguished form the sale of a plant to a buyer who continues its operation.

Discussion

The decision in this cases hinges on the intent of the parties expressed in Article XXXIV of the bargaining agreement between Interstate Brands, as seller, and the

Union. The agreement is one negotiated jointly by members of the industry, each of which individually signed identical agreements. The issue is presented in the background of a bilateral agreement between Interstate Brands, as seller, and Metz Baking Company, as buyer, in which the Union played no role. There does not appear to have been any discussion of severance pay in the course of the negotiations resulting in the sale of the Interstate plant in Omaha to Metz. The witness for the Company in this proceeding testified that the provisions of Section 10.3 of the contract of sale in which the buyer agreed to indemnify the seller in the event of any claim made against the seller by reason of the seller having been a party to the collective bargaining agreement, including "severance or termination pay" was a "boiler plate" provision which appeared in prior sales agreements. It does not appear that the parties addressed the likelihood of the assertion of any such claims. With respect to Article XXXIV, the testimony indicated that such a provision first appeared in the industry contract in Sioux City in 1963, in which the parties here were involved. The President of the Union testified that it was a standard provision in other international contracts, the purpose of which was to assure some payment to employees if a plant closed down. It was inferred that the provisions of Section XXXIV also entered the bargaining agreements in Omaha about 1963.

It is a familiar rule that if the language the parties have chosen to express their intent is clear and unambiguous there is no room for interpretation and the plain meaning of the language must be given effect. If,

however, the language employed is ambiguous, and susceptible to more than one meaning, resort to parol evidence may be had to interpret the contract. It has been said that whether a document is or is not ambiguous is a matter of impression rather than of definition. *Elkouri and Elkhouri* (3ed) p. 196. Often general words are used which may apply suitably to circumstances which the parties did not address specifically in their negotiations. An ambiguity usually means that the parties did not express themselves with clarity. The Arbitrator's job is to determine and carry out the mutual intent of the parties as if they had foreseen the event that gave rise to the dispute. The language of Article XXXIV is susceptible to more than one interpretation and, therefore, in the judgment of this Arbitrator is ambiguous.

Provisions for severance or termination pay are not uncommon in collective bargaining agreements. In the interpretation of the Agreement in this case, inquiry should be directed first to the underlying purpose of such provisions. Obviously they define an economic benefit to employees who meet the qualifications the parties have agreed upon. Under the contract severance pay is limited to full time employees who have been actively employed for at least three years. The benefit is limited to 30 hours of severance pay as their straight time hourly pay for each full year of employment beginning with the fourth year, with a limit of 900 hours of severance pay.

The qualifying event which is the condition precedent to payment of the benefit to an employee is expressed as the "displacement" from his or her employment by reason of the "closing" of an entire plant. When is an employee "displaced from employment", and when

is a plant "closed", are the critical terms involved in the interpretation of the contract.

We begin our search for the underlying purpose of such provisions for severance or termination pay with the decision of Arbitrator Willard Wirtz who held that rights and obligations under a severance indemnity claim are rights and obligations covering services already performed which survived a discontinuance of the employer's business after the collective bargaining agreement had expired. In support of his conclusion, he cited a number of judicial decisions, chief among them, *Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A. 2d 442 (1956) in which the court held that such payments are "accrued and earned". Severance pay, the court said is in the real sense. . . . remuneration for the services rendered during the period covered by the Agreement. The Arbitrator pointed out that the only cases suggesting a different rationale are those in which severance payments are analyzed as being in the nature of "liquidated damages" to cover the costs to an employee incident to his being put out of his job.

In *Adams v. Jersey Central Power & Light Co.*, 120 A 2d, 737 (1955) the Associated Gas & Electric Company sold its gas business to the New Jersey Natural Gas Company. All the employees in the gas operation of the seller were to be given the opportunity to continue employment with the buyer. The collective bargaining agreement provided that "severance pay" benefits shall be applied as follows:

> "Regular employees who have completed one (1) year or more of continuous service and who are permanently released from employment because of reasons beyond the control of the

> employees concerned shall be given an allowance of one (1) week's base pay at the rate of pay at the time of release for each full year of continuous service."

The contract of sale provided that the buyer will endeavor to employ the personnel presently employed by the seller. It also provided that the buyer would recognize credits accumulated under the seller's pension plan.

In sustaining the claims of employees against the seller the court stated:

> "To say that severance pay provisions provide only against "loss of employment" rather than a mere change in the identity of the employer is to disregard the words of the contract for words are symbols of ideas. It is not a gratuity but a compensation earned by service, and therefore contributes much to the maintenance of the good will of employees and the community generally."

In *Dahl v. Brunswick Corp.*, 356 A. 2d 221 (1976). Brunswick sold its Yacht division to Test Corporation. No collective bargaining agreement was involved but Brunswick had a policy that provided that severance pay would be granted to employees who were involuntarily terminated. Involuntary termination was defined as any separation for an indefinite period (more than thirty days) for actions not within the control of the employee when no other suitable opening is available.

At the time of sale employees were told they would be employed by the buyer and that the buyer would continue the seller's policy with respect to severance pay.

In sustaining the plaintiff's claim against Brunswick, the Court stated:

> "Although there is a dearth of Maryland authority on the point, there is ample support elsewhere for the position that when part or all of a company is sold and the employees told that they cannot remain with their old employer, their employment has been terminated even though they immediately being to work for new owners."

The Court rejected Brunswick's argument that the phrase "no other suitable opening is available" referred to any job, not simply those available at Brunswick.

In *Matthews, et al. v. Minnesota Tribune Company,* 10 N.W. (2D) 230, the Tribune sold its assets and ceased publication. This Court stated "the authorities are almost unanimous that when an employee disposes of his business the sale and transfer operates as a discharge of its employees."

Arbitrators have had occasion with some frequency to deal with the intent and purpose of severance pay claims in relevant situations.

In *M & T Company,* 69-1 Arb Par 8085, 51 LA 504, the Arbitrator defined severance pay as terminal compensation measured by services given during the subsistence of the collective bargaining agreement. In this case the employer lost a bid on a construction job and most of the employees continued work uninterruptedly with the successful bidder. The Arbitrator awarded severance payment despite the fact that the employees continued to perform the same jobs and lost no time.

In *International Paper Company*, 79-1 Arb Par 8201, the Company sold a plant that it had considered closing. The buyer wanted to be assured of employees. They faced restricted options with the seller, namely the loss of employment or transfer to another plant. Twenty two employees the buyer did not want transferred to another plant of the seller and six were given severance pay. The remaining 145 who continued employment with the buyer were not paid. The severance policy in effect provided that "employees with one year or more of service will be eligible for severance pay when laid off by Company action because there is no work available to which their seniority entitles them. The Arbitrator concluded that the phrase "no work available" meant work with the seller and awarded severance pay to the 145 employees who continued work without interpretation as employees of the buyer at the same plant. He rejected the argument that the employees were merely transferred to another employer instead of laid off by the seller.

The Arbitrator pointed out that the buyer assumed no responsibility for previously accrued severance pay, and the transfer of the employees had the effect of extinguishing whatever accrued rights the employees previously had as employees of the seller. He said that of the 145 employees offered employment by the buyer all but three went to work and were entitled to severance pay from the seller. He stated that it was his firm impression that the conclusion he had reached "was generally in accord with prior decisions", citing *Amdel, Inc.*, 74-2 Arb Par 8610 and cases cited.

In *Meadows Gold Dairies*, 69-2 Arb Par 8634, 51 LA 741, the Arbitrator held that in the sale of routes to other

companies the milk route drivers who accepted the opportunity to continue working their routes for the buyers were due severance pay. He held that the Company Grievance Pay Plan was to assist financially an employee whose employment is terminated by the Company through no fault of the employee. Eligibility was limited to full time employees who were permanently terminated. The Company's sale effectively eliminated them.

In *H.K. Porter Co.*, 49 LA 147, Arbitrator Cahn held that employees who had accumulated three or more years of continuous service were entitled to severance pay even though the bargaining agreement had expired before the Company closed the plant.

This review of arbitral and judicial precedents concludes with *Ward Foods, Inc.*, 73-2 Arb Par 8458 (1973). This case involved the interpretation of severance pay provisions in the bargaining agreement with Bakery & Confectionery Workers, Local 50, the relevant provisions of which are identical to the provisions of Article XXXIV. The initial paragraph provides:

> "(a) It is agreed that each fulltime employee who is *displaced* from his employment by reason of the *closing of an entire plant*, a department or any section thereof, or the introduction of labor saving equipment of by layoff shall be compensated for such displacement providing he has been actively employed by the Employer for a period of at least three years. . . . "

Ward Foods, Inc., sold its Newark, New Jersey, business (inventory, parts, supplies, contracts, etc.) but not its real estate, to Silvercup Bakers, Inc. The buyer agreed to

continue the Newark operations with materially the same employees for a period of two years. Ward did not give termination notices to its employees when the buyer assumed operation of the Newark plant.

The Arbitrator held that Ward Foods, Inc., was liable for severance pay to the employees at the Newark plant on the ground that they had been displaced by the sale and transfer of operations to Silvercup. He stated:

> "Further, the use of the phrase "displaced from his employment" in this cited provision of Article VIII requires reference to Article I for a determination of the meaning of the work "employment". That provision makes it clear that the "employment" that is covered there and by subsequent terms of the Agreement is confirmed to the relationship established between Ward Foods, Inc., as the Employer and its own particular employees. If that confined "employment" relationship ceases to exist for reasons not the fault of the employee, it seems reasonable to the Arbitrator to conclude that the employee is "displaced from his employment" within the meaning of Article VIII, Section (a)".

The Arbitrator supported the conclusion that the employees had been displaced from employment by stating his conclusion would have been different if the "disqualifications" in Section 2 (their Section b) included a reference to employees who secure employment at the same location with a successor company. The cessation by Ward of its operation at Newark constituted a "closing of an entire plant" within the meaning of Section 1.

The Arbitrator acknowledged that the award of severance pay "will understandably" be deemed a "windfall by Ward", but he reasoned:

> "But the Arbitrator in this instance is bound by the specific terms of Article XIII of the Agreement, and cannot read into them something which is not there. There is no indication that the parties equated severance pay with payment to an employee who has permanently lost all opportunity of reasonably equal employment at the Newark location of the Company's former plant, or who has suffered a significant period of unemployment and privation while seeking another job. If the parties intended that severance payments should be made only under such circumstances, they would have made that intent clear in Article XIII, Section (a). . . . since "employment" under this provision could only reasonably be construed to contemplate employment with Ward Foods, Inc., the unilateral substitution of some other Employer by Ward did not constitute a continuation of "employment" within the meaning of this provision."

Extensive review of both judicial and arbitral decisions lead to the following conclusions. First, severance pay is recognized as a benefit accrued for services rendered. A minimum of three years of fulltime service is a condition precedent to the accrual of benefits beginning with the fourth year of service. Second, severance pay provisions are the result of collective bargaining. Third, accrued severance pay is enforceable although the event that triggers liability occurs after the expiration of the bargaining agreement. Fourth, the purposes of severance

pay provisions have been held to be: (a) earned compensation upon termination for service rendered; (b) payment to ease the financial burden of the employee while seeking a new job; (c) liquidated damages for loss of job or to alleviate the consequences of the economic adjustment and; (d) partial compensation for loss of seniority rights and other benefits.

In this case Interstate Brands is the seller. The contract of sale and transfer of title and possession to its plant and routes in Omaha to Metz terminated its operation in that city. Its employees became new hires of the buyer and suffered the loss of seniority rights accrued under the bargaining agreement with Interstate. Their employment relation with the seller was severed. The seller offered them no options with respect to continued employment. In every legal sense they were terminated through no fault of their own, and in the ordinary and well understood sense of the term, displaced. Insofar as the seller is concerned the Omaha plant was closed as effectively as if it had voluntarily locked the doors and ceased the production of bakery products at that location. The fact that the contract of sale referred to a transfer of its employees to the buyer is irrelevant. The Union was not a party to the negotiations and did not participate in consultation relating to the rights of employees to severance pay. There is no evidence establishing any waiver of the rights of its members to severance pay, or any conduct estopping it from asserting such rights on their behalf (*Amdel, Inc*, 74 72 Arb Par 8610). The Arbitrator is fully convinced that the employees were displaced in the closing of an entire plant and the fulltime employees with

more than three years of employment meet the qualifications for severance pay defined in Article XXXIV under any theory of the purpose of such clauses. In fact they qualify on two basic grounds, first that they earned such pay on the basis of service to Interstate Brands, the seller, and on the ground that it is partial compensation for loss of their seniority rights and the economic insecurity attending such loss. These conclusions find further support in the fact that the loss of severence rights in the event of sale and continued employment with the buyer does not appear in the disqualifying events in Article XXXIV. The underlying reasons relied upon find support in the vast majority of cases, arbitral and judicial, which research has exposed.

In view of the conclusion expressed above, a subsidiary issue to which the parties addressed themselves remains. Section 2(e) of Article XXXIV defines a formula for computing the amount of severance pay due those fulltime employees who are eligible for early retirement. Section 2(d) which provides that any employee who is eligible for a normal pension at the time of separation is not eligible for severance pay, is not an issue in the proceeding. The effect of Section 2(e) is to discount the amount of severance pay an employee eligible for early retirement would receive.

The Union contends that this provision discriminates against this group of employees in violation of 29 U.S.C. 632 (a) (1) and, therefore, is invalid and should not be enforced in this proceeding. The only judicial decision tendered in support of this proposition is a decision of the United States District Court of Arizona in an action

initiated by the Equal Employment Opportunity Commission against *Bordens, Inc.*, (EEOC v Bordens, Inc. December 7, 1982). The district court held that a similar provision providing for an offset in computing the severance pay for employees eligible for early retirement established a neutral policy, but the application of it had a disparate impact on the vested rights of employees subject to it. The injection of this legal issue in the arbitration proceeding raises a question of the authority of the Arbitrator to interpret and apply the law in deciding the case.

The Arbitrator derives his authority from the bargaining agreement and the issues submitted to him for decision. Article VI of the Agreement defines a dispute submissible to arbitration for final resolution as one involving the proper interpretation or application of the contract. Elkouri devotes a chapter on the subject of the use of substantive rules of law and sums up the prevailing view of the Arbitrator's authority as follows: (*Elkouri, How Arbitration Works*, 3 ed p 321, 324)

> "Unless the parties specifically limit the power of the Arbitrator in deciding various aspects of the issue submitted to him, it is often presumed that they intend to make him the final judge on any questions which arise in the disposition of the issue, including not only questions of fact but also questions of contract interpretation, rules of interpretation, and questions, if any, with respect of substantive law. . . . On the whole, relatively wide discretion is left to arbitrators to deal with the law according to their best judgment."

The evidence establishes that the severance pay provision, including the text of Section 2(e), was adopted in

industry contracts in 1963. This case appears to be the first instance in which the validity of Section 2(e) has been challenged.

In addressing the issue an Arbitrator must start with a presumption of the validity of the provision the parties have adopted in collective bargaining. If it is clear that the contract violates an applicable statute the Arbitrator should not ignore it, but an Arbitrator should seek to avoid a construction that would render the agreement invalid. Benefit rights under severance clauses differ from pension benefits. Their purposes are different. Severance pay provisions like Article XXXIV that deny rights to employees eligible for a normal pension are recognized as valid. *See West Penn Power Co.*, 62 LA 488. The provisions in questions here reduce the severance benefit of those who are eligible for early retirement. They have an option. That such a provision violates the Equal Employment Opportunity Act is not clear. The Union is in the position of challenging the validity of the provisions it has jointly negotiated. The validity of the contract the Arbitrator is called upon to interpret should not be denied in the absence of authoritative judicial decisions. The only decision referred to by the Union is the decision of a lower federal court which is not final and binding in this proceeding. It is understood, however, that if the decision was the final decision of an appellate court holding that such a provision violates federal law, it would control the result in this case. It should be observed that the case referred to is one instituted by the agency charged with the enforcement of the Act, and some arbitrators share the view that such public policy issues should remain with the agency and the courts for

enforcement and final determination. In the absence of any authoritative decision establishing the invalidity of the formula adopted by the parties for determining the amount of the severance benefit, and in reliance upon a presumption of its validity, it is the conclusion of the Arbitrator that Section 2 (e) of Article XXXIV should be applied in determining the severance pay due those full-time employees who were eligible for early retirement when they were terminated as a result of the sale and transfer of the plant where they were employed.

Award

In accordance with the reasons set forth herein, the Arbitrator's award is as follows:

1. All fulltime employees of Interstate Brands, Inc., at its facility in Omaha, Nebraska, on the date its plant and other assets were transferred to Metz Baking Company are entitled to and shall be paid severance pay in accordance with Article XXXIV of the Bargaining agreement.

2. Those fulltime employees who were eligible for early retirement on the date of transfer shall be paid severance pay calculated in accordance with Section 2(e) of Article XXXIV of the Agreement.

Jurisdiction is retained to resolve any disputes which may arise in the course of the administration and application of this award.

Dated this December 15, 1983.

/s/ James A. Doyle
Arbitrator

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THOMAS, SELMAN (JOE), et al., Plaintiffs, vs. INTERSTATE BRANDS CORPORATION, et al., Defendant.	Civil Action File NO. 83-0-560 PRE-TRIAL ORDER (Filed APR 10 1985)

The final pretrial conference was held on this 11 day of December, 1984. Appearing for the parties as counsel were:

Plaintiffs,

Thomas Selman et al.,
Dayton Rasmussen, Esq.
3929 Harvey Street – Suite 106
Omaha, NE 68131

Defendant,

Metz Baking Company
Joe P. Cashen
Of KENNEDY, HOLLAND,
DeLACY & SVOBODA
10306 Regency Parkway
Omaha, NE 68114 (402) 397-0203

Defendant,

Interstate Brands Corporation
Joe P. Cashen
Of KENNEDY, HOLLAND,
DeLACY & SVOBODA
10306 Regency Parkway
Omaha, NE 68114 (402) 397-0203

Defendant,

Bakery, Confectionary and Tobacco Workers Union, Local No. 433
John F. Clemons
508 Davidson Building
Sioux City, Iowa 51101

and,

Harry H. Smith
SMITY & SMITH
632-640 Badger Row Building
Sioux City, Iowa 51101

Bakery, Confectionary and Tobacco Workers Union, International AFL-CIO
Never filed an answer or had counsel enter an appearance in this case.

A.

Exhibits in Evidence

The following exhibits are received in evidence without objection and no formal offer need be made of them. Exhibits are numbered and listed in Exhibit A attached hereto and made a part hereof.

B.

Foundation for Exhibits

Foundation for the following exhibits has been stipulated or waived. See Exhibit A.

C.

Parties have agreed that the following may be accepted as established facts for purposes of this case only.

February 19, 1983, the Metz Baking Company, Sioux City, Iowa, entered into a contract with Interstate Brands Corporation for the acquisition of its plant located at 2215 Leavenworth Street, Omaha, Nebraska, where it produced bakery products under the Butternut label. Metz also owned and operated a similar plant at 4383 Nicholas Street, in Omaha, where it produced bread and other bakery products under the Old Home label.

Metz and Interstate were parties to identical industry-wide collective bargaining agreements with the Bakery, Confectionary and Tobacco Workers' Union, Local No. 433. Subsequently, Metz consolidated the production of basic bakery products under the Old Home label in the Leavenworth plant.

In effecting this consolidation of operations, former Interstate employees were treated as new hires. Metz employees received preference for available jobs on the basis of their seniority. Reorganization resulted in the layoff of about 40 employees on the Interstate seniority list.

A grievance was filed with respect to the list, and on June 7, James A. Doyle, arbitrator denied the grievance on behalf of the Interstate employees and upheld Metz's action in the handling of the seniority issue.

On July 29, 1983, 36 of the former employees of Interstate, as individuals, filed this action in the United

States District Court of Nebraska against Interstate Brands Corporation and Bakery Confectionery and Tobacco Workers' Union. It is alleged that the sale of the plant in Omaha by IBC, to Metz Baking Company was a "closing" within the meaning of Article 34, Section 1, of the Collective Bargaining Agreement which entitled Plaintiffs to severence pay from the date of the sale.

Thereafter, a grievance was filed and on October 6, 1983, a hearing was had before James A. Doyle, arbitrator, which resulted in the decision on December 15, 1983, a copy of which is attached to the First Amended Petition and marked as Exhibit B thereto, which decision ordered IBC to pay serverence pay pursuant to the terms of the Agreement's Article 34.

Thereafter, Metz Baking Company was made a party defendant in this action as the contractual indemnifier of IBC in matters concerning serverence pay for the Plaintiffs. Interstate and Metz did not appeal that award and the same is final and binding with respect to them.

Metz Baking Company, in keeping with the award, computed the amount due each of the Plaintiffs in accordance with the terms of the Agreement. The amounts as computed are not in dispute. The Plaintiffs were advised that drafts had been issued on February 9, 1984, in the proper amount, payable to each of the Plaintiffs, and were advised that each individual would have to sign a Release and Receipt acknowledging receipt of their particular amount of severance pay and thereby agreeing the formula, including the anniversary date and termination dates were correct in arriving at the particular dollar

amount. Thereafter, counsel for Interstate Bakery, Confectionary, and Tobacco Workers' Union, Local 433, and Marlin Lessman on behalf of Metz Baking and Interstate Brands Corporation undertook negotiations with respect to the form of Release to be executed. Ultimately, the form of the Release was agreed upon by counsel for the Union and Metz Baking Company.

Approximately 50 percent of the Plaintiffs have accepted their severance pay. The names of such Plaintiffs and the amounts paid are shown on Exhibit 6 and they have executed copies of Release, Exhibit 8. That the remaining Plaintiffs have refused to accept payment on the basis of refusing to sign the Release which they allege is improper.

D.

Controverted and Unresolved Issues

The issues remaining to be determined and unresolved matters for this Court's attention are.

1. Is Metz Baking Company entitled to Receipt and Release upon payment of the severance pay?

2. Does the receipt as required by Metz constitute a waiver and release of *all rights*, causes of action, against Metz rather than a release of serverance pay rights.

3. Was the negotiated Release, Exhibit 7, oppressive and in bad faith or a breach of the Bargaining Agreement?

4. If Plaintiffs prevail, are they entitled to interest, attorneys' fees, and costs, or any portion thereof?

5. Did the unions fail in their duty to fairly represent Plaintiffs by negotiating and agreeing to the release as worded, i.e., giving up right to seniority suit, now before United States District Court.

E.

All witnesses, whom the Plaintiff expects to call to testify, except those who may be called for impeachment purposes only, are:

1. Selman Thomas, 1009 So. 27th St., Omaha, NE 68105

2. James Walker, 6305 No. 48th St., Omaha, NE 68104

3. Dave Bell, 1708 "H" St., Omaha, NE 68107.

All witnesses whom the Defendants, Interstate Brands and Metz Baking Company expect to call to testify, except those listed in the preceding paragraph as expected to be called by the Plaintiff:

1. Marlin Lessman, Sioux City, Iowa, Vice-President, Secretary, and General Counsel, Metz Baking Company;

2. Harry Smith, Sioux City, Iowa, Counsel for Bakery, Confectionery, and Tobacco Workers' Union Local 433, and

3. Bernard Clausen, President, Bakery, Confectionary, and Tobacco Workers' Union, Local No. 433.

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear herein, shall be permitted to testify over objection for any purposes except the impeachment.

F.

Parties do not anticipate the use of any expert witnesses.

G.

Depositions And Other Discovery Documents

No depositions, answers to written interrogatories or requests for admission are expected to be offered in evidence.

H.

Length Of Trial

Counsel estimates the trial will consume not less than one day; not more than one and one-half days, and probably one day.

THOMAS SELMAN (JOE), et al.,
Plaintiffs,

BY: D Rasmussen
Dayton Rasmussen
3929 Harvey Street, Suite 106
Omaha, NE 68131

INTERSTATE BRANDS CORPORATION, and METZ BAKING COMPANY,
Defendants,

BY: Joe P. Cashen
Joe P. Cashen
KENNEDY, HOLLAND, DeLACY & SVOBODA
10306 Regency Parkway Drive
Omaha, NE 68114 (402) 397-0203

BAKERY, CONFECTIONARY and TOBACCO WORKERS' UNION, LOCAL NO. 433,
Defendants,

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(EXHIBIT "A")

Exhibit No. 1	Union Agreement
Exhibit No. 2	Decision & Award
Exhibit No. 3	Letter, January 11, 1984, Lessman T, Union President & Counsel
Exhibit No. 4	Hold Harmless Agreement, Metz-Interstate Brands
Exhibit No. 5	List of Employees and amounts of severance pay
Exhibit No. 6	List of Employees paid and amounts
Exhibit No. 7	List of employees unpaid and amounts
Exhibit No. 8	Copy of Release and Receipt
Exhibit No. 9	Severance Pay Computation Sheet
Exhibit No. 10	Letter, February 1, 1984, Harry Smith to Bernard Clausen
Exhibit No. 11	Letter, May 15, 1984, D. Rasmussen to Union Counsel
Exhibit No. 12	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., *et al.*, Plaintiffs,	)	CIVIL NO. 83-0-560
vs.	)	MEMORANDUM OPINION
INTERSTATE BRANDS CORPORATION, *et al.*, Defendants.	)	(Filed SEP 15 1985)

ROBINSON, Senior Judge.

THIS MATTER comes on for determination following an evidentiary hearing before the Court on May 16, 1985 and the submission of briefs. At the hearing the plaintiffs and defendants Metz Baking Company (hereinafter Metz), Interstate Brands Corporation (hereinafter Interstate), and Bakery, Confectionery and Tobacco Workers' Union, Local No. 433 (hereinafter Union or Local 433) were represented by counsel.[1] Jurisdiction is conferred on this Court by the Labor-Management Relations Act, 29 U.S.C. Section 185(a) and (c). This Memorandum shall constitute the Court's findings of fact and conclusions of law as required by Fed.R.Civ.P. 52(a).

I.

INTRODUCTION

The following uncontradicted facts provide a backdrop for this action and were essentially taken from the pretrial order (Filing No. 11).

Prior to February, 1983, defendants Metz (principal place of business in Sioux City, Iowa) and Interstate produced bakery products under the respective labels of "Old Home" and "Butternut" at two different plants in the Omaha area. Metz's "Old Home" plant is located at 4383 Nicholas Street and Interstate's "Butternut" plant was located at 2215 Leavenworth Street. Both companies were parties to identical industry-wide collective bargaining agreements with co-defendant Local 433, of which all plaintiffs in this action were members.

On February 19, 1983, Metz purchased Interstate's Omaha plant which produced bakery products under the "Butternut" label. Following this acquisition, Metz consolidated the production of basic bakery products under its Old Home label in its Omaha plant. As a result of the consolidation of the two plants, former Interstate employees were treated as "new hires," while Metz employees received preferences for available jobs on a seniority basis. This reorganization caused about 40 employees on Interstate's seniority list to be laid off. A grievance was filed with respect to the layoff. On June 7, 1983, arbitrator James A. Doyle denied the grievance made on behalf of the Interstate employees and upheld Metz's handling of the seniority issue.

The present action was then filed in this Court by 36 former Interstate employees against Interstate and Local 433. The complaint alleged that Interstate's sale of its Omaha plant to Metz was a "closing" within the meaning of Article 34, Section 1 of their collective bargaining agreement and, therefore, they were entitled to severance pay from the date of the sale.

After another grievance was filed, the matter was submitted to arbitration and a hearing was held on October 6, 1983, before arbitrator Doyle. The arbitrator's December 15, 1983 decision awarded severance pay, in accordance with the Bargaining Agreement's terms, to Interstate's full time employees who worked at the Omaha plant on the date the plant was transferred to Metz.[2] (Filing No. 9, Exhibit B to plaintiffs' First Amended Petition at 23).

Metz was subsequently made a party defendant to the action in this Court as the contractual indemnifier of Interstate with regard to the issue of plaintiffs' severance pay. Metz then computed the amount due each employee according to the Agreement's terms. These amounts themselves are not in dispute. Drafts in the proper amounts were issued to each of the individual plaintiffs on February 9, 1984, and Metz advised them that before they could receive their checks each person would have to sign a "Release and Receipt," acknowledging receipt of their particular amount of severance pay and thereby agreeing the formula, including the anniversary and termination dates, was correct in computing the severance pay. After plaintiffs were so advised, counsel for Interstate, Metz, and Local No. 433 undertook negotiations as to the form of the Receipt that would be executed and the Receipt's final form was agreed upon by counsel for Metz and Local No. 433.

Only half of the individuals entitled to severance pay have signed the form and accepted their pay.[3] The remaining named plaintiffs refuse to sign the "Release and Receipt" form, arguing it is improper, and have refused to accept payment of their severance pay.

The controverted issues that were pending prior to the May 16 hearing included: 1) whether Metz is entitled to a Release and Receipt upon paying the severance pay; 2) whether the Release and Receipt waives all the plaintiffs' rights against Metz or just the severance pay rights; 3) whether the Release and Receipt was negotiated oppressively, in bad faith or in breach of the bargaining agreement; 4) attorney's fees for plaintiffs; and 5) whether the union fairly represented the plaintiffs in the negotiations of the Release and Receipt.

Testimony and evidence adduced at the hearing has honed these issues down to one: whether plaintiffs are entitled to attorney's fees. After exhibits 1-10 were received without objection, plaintiffs rested without calling any witnesses or presenting any additional evidence contending that a cause of action had been stated on the unresolved issues. The Court reserved ruling on defendants' motions for directed verdict and several witnesses testified for defendants. Although the Court has concluded that all of the above issues must be resolved against the plaintiffs and in favor of the defendants, for the sake of thoroughness each issue will be addressed.

II.

FINDINGS OF FACT

Issues 1 and 2:

Plaintiffs' counsel argued at the hearing on this matter that the "release of all claims" phrase contained in the "Release and Receipt"[4] was intended by Metz to be a release of all the plaintiffs' claims, including those in a

collateral case entitled *Thomas, et al. v. Bakery, Confectionery, and Tobacco Workers Union Local No. 433, et al.*, No. CV 83-00652 (D.Neb. filed Sept. 7, 1983). This issue regarding the extent of the Receipt's release provision was resolved when counsel for Metz and Interstate, Joe Cashen, stated at the May 16, 1985 hearing that the receipt does not relate to or have any effect on future rights of the employees with regard to future severance pay, or claims that might arise in the companion case. Cashen further indicated that Metz was willing to change the Receipt and that the form the employees are required to sign represents only a receipt.

The parties subsequently agreed, during a recess of the May 16 hearing, to a revision of the Receipt. Said revision is acknowledged by Mr. Cashen on behalf of Metz and Interstate and by Mr. Rasmussen on behalf of the plaintiffs.[5]

Due to Mr. Cashen's representations and the parties' subsequent agreement as to the form of the Receipt and the limited nature of its release provision, the Court finds that Metz is entitled to the Release upon payment of the severance pay. Issue Number 1 in the pretrial order is therefore resolved by agreement of the parties. The Court further finds that the Receipt (either in its original or subsequently modified form) required by Metz, does not release all of plaintiffs' rights against Metz. Issue Number 2 is therefore resolved in favor of Metz and Interstate, and against plaintiffs.

Issues 3 and 5:

These two issues are interrelated and generally concern the propriety of the negotiations as to the Receipt's form and content. Specifically, in Issue 3 plaintiffs claim the Receipt was negotiated oppressively, in bad faith, and in breach of the bargaining agreement, while in Issue 5 plaintiffs claim the Union did not fairly represent them during the negotiations of the Receipt.

According to Martin N. Lessman, general counsel, vice president, and secretary for Metz, he initially prepared a document entitled "Release and Receipt" between one and two pages in length. Lessman testified that the Union did not accept the initial draft and it was subsequently revised. Lessman further testified that Metz's reason for having a receipt was to ensure the person employee picking up the check was the right person and have the employees bring up any disputes at the time they received their severance pay. Contrary to plaintiffs allegations, Lessman stated that Metz and the Union agreed on the form of the receipt, that it be treated as a receipt, and that there was no intent to have it affect any other litigation.

Bernard Clausen, president of Local 433 since 1971, testified that the Union rejected the initial Release drafted by Metz and after negotiations agreed to the form of a second release. According to Clausen, the purpose of the release was to allow Metz to make sure the amount paid was proper and that it was received. Although the arbitrator retained jurisdiction to resolve any disputes that arose as to the severance pay award, Clausen indicated that no one asked the Union to take the receipt back to

arbitration. Clausen further testified that the receipts were discussed at monthly meetings and the Union informed its members who were concerned about the receipt's effect that their signature on the receipt would have no effect on their future claims.

Issue 4:

With regard to plaintiffs' request for attorney's fees, the Court notes that no evidence or statement of fees or expenses has been filed as of the date of this Memorandum.

III

CONCLUSIONS OF LAW

Construing plaintiffs' claims against Local 433 as alleging a breach of duty of fair representation, the Court concludes that issues 3 and 5 must be decided against plaintiffs and in favor of defendant Local 433.

A union must fairly represent employees both in the negotiation and administration of the collective bargaining agreement. *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1236 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 839 (1980), *citing Humphrey v. Moore*, 375 U.S. 335 (1904). "This duty extends to all stages of the negotiation and administration process and is owed to all employees within the unit represented." *Id.* In negotiating on behalf of its members, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its

discretion." *Id., quoting Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953).

For plaintiffs to establish their claim that Local 433 breached its duty of fair representation in the negotiation of the Receipt in question, plaintiffs must show that the Union's handling of this matter was "perfunctory, arbitrary, discriminatory, or in bad faith." *Taylor v. Belger Cartage Service, Inc.,* 762 F.2d 665, 667 (8th Cir.1985), *citing International Brotherhood of Electrical Workers v. Faust,* 442 U.S. 42, 47 (1979); *Vaca v. Sipes,* 386 U.S. 171, 190 (1967); *Brown v. Transworld Airlines, Inc.,* 746 F.2d 1354, 1357 (8th Cir.1984).

In the instant case plaintiffs have not shown that Local 433 acted oppressively, in bad faith, or in breach of the bargaining agreement in negotiating the language of the Receipt. As the Court has already found, the Receipt (before and after the parties agreed to the changes shown in footnote 5) was not drafted with any intent to release any of plaintiffs' claims in other cases. Plaintiffs received assurances that such fears were unfounded and were informed by their president, Clausen, that their signature on the Receipt would not jeopardize or release any claims they might have in companion cases. The Court therefore concludes and finds that plaintiffs' contentions that Local 433 acted oppressively, in bad faith, or in breach of the bargaining agreement are unsupported by the evidence and without merit. The Court therefore finds in favor of defendant Local 433 and against the plaintiffs on these claims in issues 3 and 5.

With regard to plaintiffs claims against defendants Metz and Interstate, the Court likewise concludes that

said claims are not supported by the evidence. The uncontradicted testimony of both Marlin Lessman and Bernard Clausen, who negotiated the Receipt on behalf of Metz and Local 433, respectively, shows that the Receipt drafted by them was not intended to be a release of any claims plaintiffs might have in any companion cases. Assurances were given to this effect and plaintiffs have presented no evidence to show the defendants' intentions were otherwise.

The Court therefore finds in favor of defendants Metz and Interstate and against plaintiffs on their claim contained in issue 3 of the pretrial order. Having resolved these issues, the Court now turns to plaintiffs request for attorney's fees, contained in issue 4.

Attorney's fees are recoverable only by a prevailing or successful litigant, and then only if authorized by statute or if the litigant falls within an exception to the "American Rule." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("plaintiff must be a 'prevailing party' to recover attorney's fees under [42 U.S.C.] Section 1988' "); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247-49 (1975); *Hall v. Cole*, 412 U.S. 1 (1972). *See also Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 273 (10th Cir.1975) (denying attorney's fees to plaintiff who did not prevail on any class claims in a Title VII action); *Thomas v. J.C. Penney Co.*, 531 F.2d 270 (5th Cir. 1975) (attorney's fees not awarded to unsuccessful litigants); *Sapp v. Renfroe*, 511 F.2d 172, 178 (5th Cir.1972). "[P]laintiffs may be considered 'prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Hensley v. Eckerhart*, 461 U.S. at 433 *quoting*

Nadean v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir.1978) (footnote omitted).

The Court cannot find any basis for awarding attorney's fees to plaintiffs. Plaintiffs have not achieved any success in bringing this lawsuit. The Receipt in question never deprived plaintiffs of any future rights or causes of action in companion cases and it has been available for plaintiffs' signature, along with plaintiffs' checks for their severance pay. Because the Court has found for the defendants on all claims, the plaintiffs are clearly not prevailing parties and, therefore, are not entitled to attorney's fees.

Finally, the Court mentioned in footnote 1 that a fourth defendant, the Bakery Confectionery and Tobacco Workers Union, International AFL-CIO (International Union), has not filed an answer and did not appear at the May 16, 1985 hearing. The collective bargaining agreement is between the defendants Metz and Interstate and defendant Local 433. The International Union has no connection with and is not a party to the agreement. In its answer, Local 433 indicated that it was the exclusive bargaining representative of the plaintiffs/employees (filing No. 3). Furthermore, no evidence was offered at the trial to sustain any claims against the International Union. Since Local 433 was the only union designated as plaintiffs' exclusive bargaining agent, no liability can attach to the International Union's conduct. *Sinyard v. Foote & Davis Division of McCall Corp.*, 577 F.2d 943, 947 (5th Cir.1978). Therefore, the Court finds in favor of the defendant International Union and against plaintiffs.

IV.

CONCLUSION

In accordance with the above Findings of Fact and Conclusions of Law, the Court finds in favor of the defendants and against the plaintiffs on all claims. A separate order and judgment consistent with the above findings and conclusions will be entered.

Dated this 9 day of September, 1985.

FOOTNOTES

1. The Court notes that plaintiffs named the Bakery, Confectionery and Tobacco Workers Union, International AFL-CIO as a defendant, however, the international union has not filed an answer, no counsel has entered an appearance on its behalf, and it was not represented at the May 16, 1985 hearing.

2. Neither Metz nor Interstate appealed the arbitrator's December 15, 1983 award and the same is final and binding upon them.

3. Counsel for Metz and Interstate indicated at the May 16, 1985 hearing that $47,000 has been paid out to employees who have signed the release and receipt, while $26,000 remains to be paid to employees upon their signing of the release and receipt. Of the original 36 plaintiffs, 21 have received their severance pay (Defendants' exhibit 6. The Court notes that 2 individuals, Frederick Deal and William J. Marsh, are listed as having been paid but were not named as plaintiffs in the present action), while 15 named plaintiffs still have not collected the amounts they are due. (Defendants' exhibit 7).

4. The "Release and Receipt" form [hereinafter the Receipt] is reproduced below:

RECEIPT

"WHEREAS, Metz has calculated each employees' severance pay according to the Arbitrator's instructions in his decision by following the instructions set forth in Article XXXIV of the Labor Agreement between Interstate and the Union and using the Pension information and calculations supplied by William H. Mercer, Inc., the Actuary for Bakers Local No. 433 Pension Fund; and

WHEREAS, the undersigned employee desires to settle any claims to which the undersigned employee may be entitled as a former employee of Interstate as described in James Doyle's Arbitration decision of December 15, 1983.

NOW THEREFORE, in combination [another Receipt form has "consideration" in lieu of "computation"] of the sum of ___, (the computation of which is attached hereto as Exhibit A and made a part hereof) the undersigned, does by these presents release and discharge Interstate Brands Corporation and Metz Baking Company, and the stockholders, Directors, Officers and employees of each of the foregoing entities, of and from all suits, actions, causes of actions, claims and rights to severance or termination pay in any capacity whatsoever which the undersigned may now or hereafter have and the undersigned further confirms hereby that this receipt shall apply to the undersigned's heirs, personal representatives assigns and beneficiaries as well.

Dated this ___ day of ___, 1984.

THE UNDERSIGNED:

_____

WITNESS:

_____"

5. A photocopy of the revision to which Mr. Cashen and Mr. Rasmussen agreed was attached to the Memorandum Brief of defendants Metz and Interstate, submitted after the May 16, 1985 hearing, and marked at Ex. B. Said revision is reproduced below.

" . . . does by these presence release and discharge, for severance and termination pay purposes only, Interstate Brands Corporation and Metz Baking Company, and the Stockholders, Directors, Officers and employees of each of the foregoing entities of and from ~~all~~ "severance" suits, actions, causes of actions, claims and rights to severance *pay* ~~or termination pay in any capacity whatsoever~~ which the undersigned may now have under the provisions of the award of arbitration of James Doyle issued on December 15, 1983, and the undersigned further confirms hereby that this receipt shall apply to the undersigned heirs, personal representatives, assigns and beneficiaries as well."

Undersigned however, reserves any rights he might have in the pending action in the District Court of Douglas County, Nebraska, captioned *Nebraska Equal Employment Opportunity Commission v. Interstate Brands Corporation and Metz Baking Company*, Doc: 838 No: 715.

"OK JOE P. CASHEN ON BEHALF OF I B C & METZ."

"OK AS TO RESOLVING ISSUE RE ISSUE #1 OF PRE-TRIAL ORDER.

D. O. RASMUSSEN"

AGREEMENT

THIS AGREEMENT, made and entered into by and between METZ BAKING COMPANY, ITT CONTINENTAL BAKING COMPANY, INC., and INTERSTATE BRANDS CORPORATION, hereinafter referred to as the Employer and THE BAKER, CONFECTIONERY AND TOBACCO WORKER'S UNION, LOCAL NO. 433, of Omaha, Nebraska, hereinafter referred to as the Union, or Employees, for the employees within the classifications hereinafter designated who are in the employ of the Employer:

WITNESSETH:

THAT, in consideration of the covenants hereinafter contained, by and on the part of each of the parties hereto, it is hereby mutually agreed as follows:

ARTICLE I

RECOGNITION

SECTION 1. The employer recognizes Bakery, Confectionery and Tobacco Worker's Union, Local 433, of Omaha, Nebraska, as the exclusive bargaining representative of employees who are engaged in the preparation, production, shipping, wrapping and packing of bakery products, also truck loaders and miscellaneous helpers for the purpose of collective bargaining.

SECTION 2. All employees who on the effective date of this Agreement are members of the Union and all employees who become members after that date may

maintain their membership in the Union for the duration of the Collective Agreement.

SECTION 3. It is further understood and agreed that if applicable State and Federal laws which prohibit signing the Union Shop Contracts shall be repealed or amended so as to make Union Shop Agreements valid and legal during the terms this Agreement is in force and effect, the above provision shall be superseded by the provisions of Article I of the Agreement existing between the parties hereto prior to May 1, 1947.

ARTICLE II

STEWARDS

The Employer recognizes the right of the Union to designate job stewards to handle such Union business as may from time to time be delegated to the job stewards by the Union Executive Boards. Job stewards shall properly report all complaints to Employer.

ARTICLE III

DELEGATES TO CONVENTIONS

Delegates to conventions and elected officers shall be given required time off for Union duties without pay, but notice of such necessary time off shall be given to the Employer as soon as possible.

ARTICLE IV

EXCLUSIVE AGREEMENT

The Employer agrees not to enter into any agreement or contract with its employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement.

ARTICLE V

TEMPORARY TRANSFERS

Section 1. The Union agrees to cooperate with the Company in filling jobs of a temporary nature within or between departments. There shall be no abuse of this provision. In the event a controversy occurs over such transfer, the Union Steward will be consulted by the supervisory personnel.

Section 2. Any regular full time employee working under more than one classification shall receive the rate of wages provided in the highest classification in which he or she has performed one-fourth (1/4) of their guaranteed work week of forty (40) hours, (namely, ten hours work in the higher classification) and there shall be no evasion of this clause by shifting of regular full time employees, provided, however that any person now employed shall not be reduced in the present classification by the application of this rule. Temporary vacancies shall be limited to sixty (60) days. After sixty (60) days, it becomes a permanent vacancy and goes up for bid in the normal manner. Such shall not apply to temporary vacancies due to illness or vacations.

ARTICLE VI

ARBITRATION

Section 1. In the event a dispute shall arise between the Employer and the Union with reference to the proper interpretation or application of the provisions of this contract, such dispute shall be reduced to writing within seven (7) calendar days of the date the dispute arises, and if such dispute cannot be settled by mutual agreement of the parties, then upon the request of either the Employer of the Union, or both, such dispute shall be referred to a Board of Arbitration. Said Board of Arbitration shall consist of three (3) members, one of whom shall be appointed by the Employer, one by the Union, and the third member appointed by the two (2) members so selected. In the event the two (2) members first chosen cannot agree upon a third member within three (3) days after the second member has been chosen, then such third member shall be chosen as follows:

Section 2. The Union and Employer party to the dispute shall write a joint letter to the Director of the United States Mediation and Conciliation Service requesting that he submit the names of five (5) persons from this general locality who would be available to act as a third arbitrator, and from such list of five names, the Employer shall strike two (2) and the Union shall strike two (2), and the person whose name is still remaining on said list shall become the third arbitrator and the Chairman of the Board of Arbitration. Such Arbitration Board shall submit its award in writing and such award shall be binding upon the Employer and the Union and upon the employees involved.

Section 3. The party requesting arbitration shall give written notice of the fact to the other party and shall in such notice furnish the name of its arbitrator, and the opposing party shall within five (5) days thereafter appoint its arbitrator and give notice thereof in writing to the other party. The parties shall divide the expense of the third arbitrator.

ARTICLE VII

STRIKE AND LOCKOUT

SECTION 1. The Union agrees that it will not, during the time this contract remains in force, call out on strike the employees of the Employer for any reason other than the violation of this contract, and then only after twenty-four (24) hours written notice to the Employer, and failure on the part of the Employer upon such notice to cure such violation within said twenty-four (24) hour period, or to offer in writing to submit the disagreement to arbitration as provided in Article VI herein, and any such strike, if called, shall be only against such Employer or Employers signing this contract agreement who shall have violated this contract.

SECTION 2. The Employer agrees that it will not, during the time this contract remains in force, enforce a lockout against the employees of the Employer for any reason other than the violation of this contract and then only after twenty-four (24) hours written notice to the Union, and failure on the part of the Union upon such notice to cure such violation within said twenty-four (24) hour period or to offer in writing to submit such controversy to arbitration as above stated, and any lockout, if

instituted, shall be instituted only by the Employer or Employers signing this contract agreement whose employees shall have violated this contract.

ARTICLE VIII

PRODUCTS FOR STRUCK BAKERY PLANTS

It shall not be considered a violation or breach of this Agreement for the employees working under this contract to refuse to produce products for any bakery plant which is involved in a bona fide labor dispute, strike or lockout.

ARTICLE IX

PICKET LINE CLAUSE

It shall not be a violation of this Agreement for the Local Union to require its members to refuse to go through or work behind any legal and authorized primary picket line sanctioned by the Local Union, party to this agreement, and it shall not be cause for disciplinary action for any employee to refuse to go through or work behind any such picket line.

The Union shall give twenty-four (24) hours prior written notice to the Employer of its intention to honor such picket line.

ARTICLE X

SENIORITY

Section 1. Except in executive or supervisory positions, if permanent vacancies occur, the regular full time employee with the greatest plant-wide seniority, if qualified, shall be given preference in filling the job.

Section 2. All such vacancies shall be posted on the bulletin board for three (3) working days exclusive of Saturdays and holidays and within seven (7) working days thereafter the job will be filled. The posting shall indicate the shift, wage rate and general job description. Once regular full time employees place their names on the bid sheet they cannot delete their name from the bid. Regular full time employees who are awarded a bid will be allowed a two (2) week training and qualifying period, which may be extended to three (3) weeks by agreement of Company and Union. During the trial period the job vacated will not be posted for bid until such time as the successful bidder has proven that he or she can satisfactorily perform the work of the new job. Afterwards, the vacated job will be posted and awarded as outlined above. This then closes the bidding. If any employee qualifies before the training and qualifying period expires, he or she shall receive the rate on the job which he or she is performing. The Employer shall decide the qualifications of the employee for such new job or vacancy.

Section 3. Upon failure to qualify for a new position after promotion, the employee shall have the privilege of returning to the position of employment held by him or her at the time of promotion, and shall receive the same

pay then received by other employees in the same classification.

Section 4. In the event it becomes necessary to reduce the working force for the lack of business or other legitimate reasons, the last person hired in the plant shall be the first person laid off and in returning to work the last person laid off shall be the first person recalled, for a permanent full time job.

Section 5. Regular full time employees with thirty (30) days or more seniority in the plant may in the case of lay-off apply their plant seniority as follows:

A. Employees may replace employees in order of seniority.

B. The employees who are laid off and exercise their plant seniority shall carry forward their plant seniority.

Section 6. An employee who is recalled and cannot qualify for such full time job or disqualifies him/herself shall forfeit his/her seniority and right to further recall.

Section 7. Failure to report within three (3) days after notice of recall or a lay-off for more than twelve (12) months shall terminate an employee's seniority and right to recall. Notice of recall shall be by registered mail to address furnished Company by laid off employee.

Section 8. Regular full time employees on layoff, if qualified shall be given the opportunity to work any part time hours available. Failure to accept such part time work or failure to qualify for such work shall not affect the employers obligation to recall that employee for a regular full time job as required above. The employer

shall use reasonable efforts to notify such employee of the available part time work. Such reasonable effort would include: attempt to contact employee by telephone and requesting assistance from the Union Stewards. Such part time work shall not be used to accrue seniority.

Section 9. When new jobs are created except in an executive or supervisory position, the oldest employee in point of service in the plant, if qualified, shall be given preference in filling the various job openings, but the Employer shall decide the qualification of the employee for the various jobs created. Upon failure to qualify for a new position, the employee shall have the privilege of returning to the position of employment held by him or her, and shall receive the same pay then received by other employees in the same classification.

Section 10. Employers agree to provide a plant wide seniority list on April 1st of each year.

Section 11. The Employer will give a copy of all bids to the steward.

Section 12. An employee is allowed three (3) successful bids per year except for bidding on a higher paid job.

ARTICLE XI
HOURS OF WORK – PREMIUM PAY AND GUARANTEED WORK WEEK

SECTION 1. Forty (40) hours shall constitute the maximum work week before overtime premium pay; forty (40) hours shall constitute the guaranteed minimum work week for all regular full time employees. Eight (8)

hours shall be the maximum work day before overtime premium pay. Seven (7) hours shall be the minimum work day. Overtime shall be paid for work in excess of eight (8) hours per day or forty (40) hours per week. If and when the Employer shall operate a five (5) day drop sales week (5 production days), then the minimum work day shall be eight (8) hours (under the five (5) consecutive day work week, there will be two (2) seven (7) hour minimum work days per work week).

SECTION 2. The clause in this contract which guarantees a given number of work hours per week shall not be construed to mean that the Employer is required to pay wages to employees when the plant is not operating by reasons of bombings, strikes, lay offs, floods, war, riots, act of God, in the event of shutdowns or reduced work week due to energy shortages, or anything over which the Employer has no control. Such energy shortages must be verified by the authority responsible for the curtailment, or the energy supplier curtailing the supply.

SECTION 3. The Employer shall not be required to pay overtime rates for work in excess of eight (8) hours in any day and again pay overtime rates a second time for work in excess of forty (40) hours in the work week. Overtime rates shall be paid at the rate of time and one-half, based on the wage scale for classified workers.

SECTION 4. Regular full time employees' scheduled work week shall consist of five (5) days with a minimum of forty (40) hours of work. The two (2) days off each week need not be consecutive.

SECTION 5. All regular full time employees who work each day during the scheduled work week will be guaranteed forty (40) hours of pay for the work week.

SECTION 6. If a regular full time employee works on his or her scheduled day off, they shall be guaranteed seven (7) hours at time and one-half, eight (8) hours guaranteed if Employer is on a five (5) day drop sales week (5 production days) for the hours so worked on said day, provided they also work on their five (5) scheduled work days during said week. Any employee who works on his or her scheduled day off shall not be required or scheduled to take another day off for that work week.

SECTION 7. Each Thursday, before the end of the first shift, the scheduled days off for the following week shall be posted in the plants. Starting time shall be posted two (2) days in advance. A copy of the schedule shall be made available to the appointed Union Steward. There shall be no split shifts.

SECTION 8. Before a person leaves on their last day of employment in any work week, any regular full time employee shall be able to determine from the supervisory personnel of their department the time when they shall report for work on their first scheduled work day of the following work week, and they shall not be required to report at a different hour, except in cases of emergency caused by other employee's failure to report for work as scheduled.

SECTION 9. No employee shall be required to work in excess of twelve (12) hours, excluding lunch, without their consent, except in case of breakdown or act of God.

SECTION 10. When starting times are changed over four (4) hours, three (3) days per week, employees can vacate the job and use their seniority to bump wherever their seniority will permit. Qualifying period as provided in Article X will apply in these cases. (THIS SECTION TEN (10) APPLIES TO METZ ONLY). An employee will be notified as soon as possible of expected overtime.

SECTION 11. It is understood and agreed to by the parties hereto that the following provisions constitute a modification of affected work week provisions contained in the basic labor agreement. It is recognized by the Employer that a work schedule designed to provide employees with two (2) consecutive days off is a serious objective of the Union and of the employees it represents, and, therefore, the Employer shall take such steps as are practical in its judgment without doing serious harm to its business and thereby the job security of its employees to meet that objective. It is agreed that the basic Labor Agreement between the parties shall be amended effective July 1, 1974 to provide the following:

(a) Any regular full time employee who is assigned to a work schedule that does not provide for two (2) consecutive days off shall be credited with an earned work credit of ten dollars ($10.00) for each Sunday worked under any such non-consecutive day work schedule. Part time employees replacing full time employees on a job for a full scheduled work week that does not provide for two (2) consecutive days off shall receive work week credit. It is understood that it is the intention of this Agreement to, and the Employer shall, maintain or modify existing work schedules so as to provide either

consecutive days off or the earned work credit provided for in this Agreement.

(b) The pay provided for in paragraph 1 above shall be paid in the form of a lump sum after December 1st of each year, or, such pay, once accrued, may be taken in the form of paid time off if the regular full time employee requests such time off and Employer agrees.

(c) An employee must be on the payroll as of December 1st of any calendar year to be eligible for payments accrued under paragraph 1 above and on such date must be a regular full time employee with at least thirty (30) days of service. Employees on lay-off status with right to recall shall likewise be eligible for payments credited. A regular full time employee who continues on the payroll as part time employee shall be entitled to payments accrued. Any employee who resigns and gives adequate notice of such resignation shall be entitled to receive payment for accrued work week credits. Any regular full time employee who is permanently separated as the result of a plant closing shall be entitled to payments accrued. A regular full time employee who has been on the payroll with at least thirty (30) days of service but voluntarily terminates or is discharged prior to December 1, shall receive payment for his/her accrued work week credits.

ARTICLE XII

DEFINITIONS

For the purpose of clarity in the interpretation of this contract, the following definitions shall apply to the classifications mentioned herein:

Superintendent: One not engaged in the actual production or distribution work of the plant.

Supervisor: One supervising production or distribution work in the plan who does not perform actual work at any of the various machines or other work displacing a regular employee, except in cases of emergency.

Working Foreperson: A supervisor who also performs actual work at any one of the various machines or any other kind of work. Working foreperson may perform actual work normally performed by any other employee in the bargaining unit in an emergency and under such circumstances as are hereinafter listed and similar circumstances which may arise. Working forepersons may work relief during the lunch period or during relief breaks, may work relief for sickness, or other employees not showing up for work or not available, working forepersons may do designated work which is not of sufficient duration as to require a regular full time employee on a shift providing the persons actually on the shift are occupied with other duties preventing them from performing the designated work. Working forepersons may work a regular shift in a regular department, such as, a working foreperson working part time or all the time on the bench or working foreperson working the shipping department in the manner in which working forepersons

are presently operating in the shipping department of CONTINENTAL BAKING COMPANY and METZ BAKING COMPANY. Working forepersons help where the work is not progressing satisfactorily or there is a lag in production, and working forepersons may teach and train employees in the bargaining unit. In the Make-up Department working forepersons may not take part of a regular full time employee's shift to prevent such employee receiving overtime.

Dough Mixer: One responsible for and engaged in the actual mixing of doughs and sponges.

Pie Mixer: One responsible for and engaged in the actual mixing of pie doughs and fillings.

Cake Mixer: One responsible for and engaged in the actual mixing of cake batters and icing.

Oven Person: One responsible for the operation of the oven, for the proofing of bread, who loads or unloads, or fires, or adjusts the same, or one responsible for and who operates roll, cake or pie ovens.

Bench Person: Those who are capable, through experience, to complete operation required by hand on the bench of bread, rolls, cakes, or cookies.

Machine Person: This includes dividers, moulders, twisters, panners, cake depositors, doughnut machine operators, mechanical slicing machine and wrapping machine unit operations, who are the persons employed on and responsible for the operation and adjustment of those machines.

Bake Shop Helpers: One engaged in the production department not otherwise classified.

Oven Dumper or Oven Helper: One who dumps bread pans from the oven; also, one who assists in loading the oven.

Icers, Boxers, and Baggers: Those employed in icing, finishing and labeling of cakes, pies, or donuts.

Relief Person: One who relieves other employees on their day off. Relief employees shall be paid the rate of the highest classification in which they perform any work.

Break Person: One who relieves other employees for relief periods and lunch. Break employees shall be paid the rate of the highest classification they relieve for relief periods or lunch.

Fruit Cooker: One who cooks fruit and other filing for pies or rolls.

Stock Person: One engaged in receiving, checking or storing of raw materials.

Head Stock Person: In charge of stock and receiving.

Ingredient Scaler: One who is responsible for pre-mixing and pre-weighing the ingredients for either cakes, cookies, buns, or bread.

Packers: One required to rack, assemble, load trucks, and pack from conveyors, machines, and racks in shipping departments.

Miscellaneous Helper: (Other than Bake Shop Helpers). One who does general cleaning around the plant, such as sweeping, scrubbing, exterior machine cleaning, and similar work.

Pan Cleaner: One who washes, cleans or prepares for use cake or pastry pans; also one who washes bread pans. Pan cleaners shall not be considered helpers nor as classified workers. When a pan cleaner does work other than that above mentioned, he shall be considered a Helper, and shall receive a Helper's wages.

Checker: One responsible for the checking of orders; and also the checking of returns.

Cooler Person: One who loads the cooler.

Dough Room Helper: One who assists the dough mixer.

Regular Full Time Employee: One who is employed not less than four (4) days in any one week.

Part Time Employee: One who does not work on a regular schedule but who is subject to call. Part time employees' wage scale shall be the same as regular employees receive for the same work. Part time employees shall be given preference for full time employment when vacancies occur provided they are qualified, and provided they give notice to the Employer that they are available for regular employment Four (4) hours shall be the minimum work day for part time employees. The guaranteed work week shall not apply to such employees. It is agreed that a regular employee will not be sent home and relieved by a part time employee before the regular employee has had eight (8) hours work on that day.

The Employer may schedule regular part time shifts. The status of a part time employee who is scheduled and does work a regular work week shall not be effected

where such situation is caused by absenteeism, illness, vacations and/or institution of a part time shift.

In the event an employee feels he/she is working excessive overtime hours and makes that feeling within a reasonable length of time, part time employees may be used to relieve the situation.

Cake Decorator: A person who is qualified through experience and training, and who performs the operation of decorating fancy cakes.

Automatic Pan Washing Machine Operator: One who operates and is responsible for adjustment and supervision of the operation of an automatic pan washing machine.

Pie Dough Sheeter Operator: One who operates and is responsible for the adjustment and operation of the Pie Dough Sheeter.

Power Lift Operator: An employee who operates a power lift.

Broth Person: Scale ingredients, make lard formulation, set broths at the right temperature and transfer broths.

Panel Person: One responsible for the operation for the panel, scaling weights, dough temperature, putting racks in proof box and checking pan feeder line.

Pan Packer on Bread Moulder and Panel: One who racks pans from bread moulder or panel.

ARTICLE XIII
WAGE RATES

SECTION 1. The Employer agrees to pay the employees not less than the following scale of wages:

	Effect-tive May 2, 1982 Per Hour	Effect-tive May 7 1983 Per Hour	Effec-tive May 6, 1984 Per Hour
Working Foreperson	$9.00	$9.50	$10.10
Cake Decorator	8.93	9.43	10.03
Donut Mixer, Dough Mixer, Brothperson, Panel person	8.83	9.33	9.93
Oven Person	8.83	9.33	9.93
Cake Mixers	8.83	9.33	9.93
Pie Mixers	8.83	9.33	9.93
Bench Persons	8.76	9.26	9.86
Machine Person	8.74	9.24	9.84
Ingredient Scalers	8.73	9.23	9.83
Oven Dumpers and Helpers: (Discharge end tunnel oven)	8.79	9.29	9.89
Oven Dumpers and Helpers	8.75	9.25	9.85
Dough Room Helpers	8.65	9.15	9.75
Head Stockperson	8.75	9.25	9.85
Checkers	8.65	9.15	9.75
Fruit Cookers	8.65	9.15	9.75
Pie Dough Sheeter Operator	8.58	9.08	9.68
Pan Racker on Bread Moulder and Panel	8.63	9.13	9.73
Stockperson	8.53	9.03	9.63

Automatic Pan Washing Machine Operator	8.53	9.03	9.63
Cooler Person, Bake Shop Helpers, Packers	8.53	9.03	9.63
Pan Cleaners	8.43	8.93	9.53
Miscellaneous Helpers: (Other than bake shop helpers)	8.42	8.92	9.52
Packers – Donuts and Pies	8.43	8.93	9.53
Power Lift Operator	8.63	9.13	9.73
Flour Blenders	8.63	9.13	9.73
Pie Flipper, Icers, Boxers and Baggers	8.34	8.84	9.44

Economic items shall be retroactive to the effective dates designated for employees in the employ of the employer upon ratification of the contract.

SECTION 2. An additional ten cents ($.10) per hour over the regular wage scale shall be paid to all employees for work performed between the hours of 6:00 P.M. and 6:00 A.M..

SECTION 3. The Employer agrees that it will not reduce any wages now being received by employees which are higher or better than those herein set forth.

Section 4. Effective May 18, 1980, employees shall receive during the first nine (9) months of service with the Employer not less than 80% of the wage rate provided for in this Agreement. After nine (9) months of service with the Employer, such employees shall be paid not less than 90% of the wage rate provided for in this Agreement. After twelve months, commencing on the first anniversary date of employment and thereafter, such employees shall receive the wage rates provided for in

this Agreement. This shall apply to all classifications provided for in this Agreement. Employees in the employ of the Employer on May 17, 1980, (ratification date) shall not be affected and their rates shall be red circled to provide pay in accord with the current contract rates.

ARTICLE XIV
LUNCH AND RELIEF PERIODS

Section 1. Company agrees all employees shall receive a ten (10) minute relief period in that period of time ninety (90) minutes after employee starts his/her shift and prior to the completion of one hundred fifty (150) minutes of the shift.

Section 2. Another relief period of ten (10) minutes shall be provided all employees in that period of time ninety (90) minutes after employee returns from lunch and prior to the completion of one hundred fifty (150) minutes. On shifts over eight (8) hours, relief shall be provided on a comparable basis. Relief periods may be given by working forepersons or some employee in the bargaining unit, designated for that purpose by the Employer. there shall be no reduction in employee's pay for relief periods.

Section 3. A lunch period of thirty (30) minutes without pay shall be scheduled in that period of time, one hundred ninety five (195) minutes after the starting time and be completed by three hundred fifteen (315) minutes. This provides a period of one hundred twenty (120) minutes, in which to start and complete lunch period. Any employee not receiving a full thirty (30) minutes within

the prescribed time, lunch time will be given and paid for by the employer.

ARTICLE XV
HOLIDAYS

Section 1. The following holidays, or at the Employer's option the day immediately preceding, shall be observed as holidays: Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas, and New Years Day. In weeks in which holidays occur, regular full time employees covered by this contract shall be paid for eight (8) hours at their regular basic rate for hours not worked on the day so observed as a holiday, subject to the following conditions and exceptions:

Section 2. No employee is to be paid for the holiday unless they work on the last scheduled working day before the holiday and on the holiday itself, if scheduled, or their first scheduled working day after the day the bakery is not working because of a holiday, except in the event of an excused illness or absence. However, a full time regular employee (one who has been in the Company's employment over thirty (30) days) may, if he/she has been absent on either or both of the two (2) days mentioned above bring to the Employer a doctor's certificate showing that he/she was too ill to work. The fact that an employee is on vacation during a week in which a holiday occurs shall not deprive an employee of holiday pay if they would otherwise qualify for such holiday pay under the provisions of this contract.

Section 3. If the total absence from work, during which the absence on the day before or after the holiday

is included, exceeds two (2) calendar weeks, employee is presumed to be on "sick leave" and is not to receive holiday pay, regardless of reason for such absence. During such two (2) week period the employee shall not qualify for more than one (1) paid holiday.

Section 4. Employees scheduled to work four (4) days in a holiday week will be guaranteed thirty-two (32) hours of work and employees scheduled to work five (5) days in a holiday week will be guaranteed forty (40) hours of work, provided the employees so scheduled to work report for work and work such required hours on their scheduled days. The guarantee herein provided for shall not include but shall be in addition to the eight (8) hours holiday pay which the employee may be entitled to under the provisions of this Article. Any employee who is called in to work on a holiday week on their scheduled day off shall receive time and one-half for the hours worked on such day.

Section 5. In addition to the holidays set forth above, each regular full time employee shall receive his/her birthday as a holiday with eight (8) hours pay at straight time. If the employee's birthday falls on a day on which he/she is not scheduled to work, it shall be observed on the first day following on which he/she would be scheduled to work. If the birthday falls on a day employee is off another mutually agreeable day will be observed. If birthday falls on February 29th, March 1st will be observed. An employee must have six (6) months seniority to be eligible for the birthday holiday provisions contained herein.

Section 6. Overtime at the rate of time and one-half the regular rate of pay shall be paid after thirty-two (32) hours of actual time worked during weeks in which the above holidays occur. There shall be no more than one (1) premium pay for the same hours worked.

ARTICLE XVI
VACATIONS

SECTION 1. All regular full time employees who have been in the service of the Employer for one (1) year or more shall be granted an annual week's vacation with pay, and all regular full time employees who have been in the service of the Employer for three (3) or more consecutive years shall be granted an annual vacation of two (2) consecutive weeks with pay, all regular full time employees who have been in the service of the Employer for ten (10) or more consecutive years shall be granted an annual vacation of three (3) consecutive weeks with pay, and all regular full time employees who have been in the service of the Employer for eighteen (18) or more consecutive years shall be granted an annual vacation of four (4) weeks with pay, all regular full time employees who have been in the service of the Employer for twenty-five (25) or more consecutive years shall be granted an annual vacation of five (5) weeks with pay.

Section 2. Vacation compensation shall be computed on the basis of forty (40) hours at the individual's rate of pay in effect at the time of such vacation.

SECTION 3. Employees who are laid off during their first year of employment for a period of less than six (6) months shall receive one (1) week's vacation after they

have worked for the Employer twelve (12) full months. (A month in which the employee has worked 145 hours or more shall constitute a full month). Seniority for these employees shall date as far as lay-offs and recalls are concerned from the date of their employment.

SECTION 4. Vacation periods shall be earned on the anniversary date of the employment of the employee, except in case of employees laid off during the first year of employment whose vacation anniversary date shall be the date their first vacation is earned, but vacations shall be spread out over the entire twelve (12) months of each contract year and shall be chosen by employees in order of seniority, except that no less than six (6) employees shall be absent from the bakery on vacation at any one time. However, the Employer will endeavor to permit more than six (6) employees to be absent from the bakery at any one time if it does not impair the efficiency of production.

Section 5. Those weeks where less than six (6) employees request vacation this clause will not apply.

Section 6. Pay in full for vacation week, or weeks, and work done prior to vacation must be made before employee leaves on vacation.

Section 7. An employee who is absent from work for a period of excess of four (4) months shall receive pro-rate pay of full vacation benefits. An employee who is absent from work because of illness less than four (4) months shall receive his or her full vacation pay.

Section 8. Employees with more than one (1) week's vacation due may, if he or she desires, split the vacation

into not more than two (2) periods, but such employee may exercise his or her seniority for only one (1) period until all others have chosen. Second selection shall be based on seniority after all employees have exercised their initial selection.

SECTION 9. Employees whose employment is terminated, except in cases of dishonesty, drunkenness, drinking on the job, or insubordination, shall receive vacation pay pro-rated, after the first full year of employment, on the basis of 1/12th or forty (40) hours for those who have worked one (1) or more years but less than three (3) years, and 1/12th of eighty (80) hours for those who have worked three (3) years or more but less than ten (10) years; and 1/12th of one hundred twenty (120) hours for those who have worked ten (10) years or more than 1/12th of one hundred sixty (160) hours for those who have worked eighteen (18) years or more, for each completed month worked subsequent to the anniversary date of employment.

SECTION 10. Any employee who enters the armed services under the provisions of Article XXX of this Agreement, or is laid off for less than six (6) months after having worked for twelve (12) months or more, shall receive such portion of their vacation pay as has been earned by them from their last anniversary date up to the time they leave the employ of the Employer.

Section 11. If and when such employee returns from the armed services, or from his lay-off to the services of the Employer, he/she shall receive on reaching his/her original anniversary dates such portion of his/her vacation pay as has been earned by the person from the time

of their return to the time of their anniversary date. Such employees shall be permitted to take their vacation as earned under the provisions of Section 1 of this Article, but without pay other than herein provided.

SECTION 12. Any employee now in the service who has not been paid prorated vacation pay as provided in the first paragraph of Section 4 hereof shall if they return from the armed services to the services of the Employer, receive their regular full vacation with pay upon reaching their original anniversary date of employment after such return.

ARTICLE XVII

PAY PERIOD

Employees shall receive full pay weekly for all time spent in the service of the Employer. Wages shall be paid each and every week, payday to be determined by the Employer.

ARTICLE XVIII

MANAGEMENT, DISCHARGE AND DISCRIMINATION

SECTION 1. The management of the business and the direction of the working force are reserved to the Employer, it being recognized that the duration, tenure and termination of individual employment is a constituent part of management.

SECTION 2. Employees having more than thirty (30) days' continuous service shall be discharged only for just cause, and no such employee shall be discharged or

temporarily laid off without being given one calendar week's previous notice or pay for one week. In all cases of discharge, employees shall be given written notice stating the cause of discharge and a copy of such notice shall be given to the Union. However, in cases of discharge for dishonesty, drunkenness or insubordination the written notice of discharge need not be given one week in advance, and one week's advance pay will not be required.

Section 3. Appeal from discharge must be taken within one week from the date of discharge by written notice to the Employer setting forth the ground of appeal. If such appeal is not taken within such period, then objection to discharge shall be considered completely waived.

Section 4. The hearing on appeal from discharge shall be had within one week from the time the Employer receives notice of appeal. If the Employer fails to grant hearing within such time, or if hearing be had and the matter can not be satisfactorily adjusted by mutual agreement, then upon the request of either party it shall be submitted to arbitration as provided in Article VI hereof.

Section 5. No employee shall quit their position without giving the Employer one week's notice under penalty of paying to the Employer damages in the amount equal to the one week's pay.

Section 6. There shall be no discrimination on account of Union activities.

ARTICLE XIX

REST PERIOD BETWEEN WORKING DAYS

An unbroken rest period of not less than ten (10) hours must be allowed every member of the Union during each twenty-four (24) hours of working days, except in case of emergency.

ARTICLE XX

RECORDING OF STARTING AND QUITTING TIME

The Employers agree to keep in their place of business a satisfactory means of recording the starting and quitting time of employees, the records of which shall be accessible to a business representative of the Union whenever a complaint is made to the Union.

ARTICLE XXI

CHECK-OFF

The Employer shall deduct Union dues and initiation fees from employee's pay check, when proper authorization in writing is furnished in conformity with State and Federal Laws. Union dues shall be deducted not later than the last pay period of the current month, for the month following. Initiation fees shall be deducted each week until such fees are paid in full.

ARTICLE XXII

EXPENSE OF PHYSICAL EXAMINATION

Employers requiring employees to take physical examinations must pay the expense of such examinations.

ARTICLE XXIII

PRESENTABLE WORKING CLOTHES AND EMPLOYER'S CONTRIBUTION TOWARD EXPENSE

Section 1. Employees must keep themselves clean and report for work in presentable working clothes. It is understood that presentable working clothes shall be clothes appropriate for the work being performed in food production plants, and for Production Classifications shall be clean, white clothes.

Section 2. When aprons are required by the Employer, the Employer shall furnish the aprons and launder the same. Aprons shall remain the property of the Employer and the employee shall be responsible for them.

Section 3. Regular full time employees (employees who have been in the Company's employment more than thirty (30) days) shall be allowed one dollar ($1.00) per week each week they are working and on the payroll, including their vacation weeks, toward the cost of procuring, maintaining and laundering presentable working clothes.

ARTICLE XXIV
HELPERS

Section 1. Bake Shop Helpers are to be allowed as follows: One Helper for one to five journeypersons working in Bread Shop; two helpers for six to ten journeypersons working in Bread Shop; and three helpers for eleven to fifteen journeypersons working in such Bread Shop, and so on in like proportion. This applies to each shift. The ratio of helpers to classified workers in Cake and Pastry Shops shall be double the number of helpers permitted in Bread Shops.

Section 2. For the purpose of this Article, the terms "journeyperson" or "classified workers" shall be those employees who are being paid at an hourly wage rate equal to or greater than that set forth herein for the classification of Ingredient Scaler.

ARTICLE XXV
UNION BUSINESS AGENT

A business agent of the Union, upon presentation of proper credentials, shall have the privilege of entering the shop during working hours after securing a permit from the representative of the Employer in charge of the plant.

ARTICLE XXVI
LAY OFF BECAUSE OF SICKNESS OR INJURY

Employees who have to lay off on account of sickness or injury for a period of not to exceed two (2) years shall

not lose their jobs or seniority rights by reason of such absence. This time can be extended by mutual agreement of the Employer and the Union.

ARTICLE XXVII

MATERNITY LEAVE

The Employers will conform to appropriate practices approved by Federal legislation. The employee, on such maternity leave, shall return to work after termination of such maternity leave, within a reasonable time in accord with Federal requirements.

ARTICLE XXVIII

FUNERAL LEAVE

In the event of death in the employee's immediate family, (i.e., father, mother, sister, brother, son, daughter, step child, husband, or wife, mother-in-law and father-in-law, it is recognized by the parties that the employee may need time off to attend the funeral service, from the day of the death to the day of the funeral. If any of these days off are the employee's scheduled working days, the Employer will grant eight (8) hours pay at the straight time hourly rate for each such full day lost, but not to exceed a maximum of three (3) full days.

ARTICLE XXIX

DEDUCTIONS FROM PAYCHECK

The Employer shall not be allowed to deduct anything, except deductions required by law, from any paycheck without the written consent of the employee.

ARTICLE XXX

MILITARY SERVICE

Any regular full time employee on the active seniority list of the Employer who is inducted into military service under the provisions of the Federal Selective Training Act of 1940, or any amendment to said Act, hereinafter enacted, or voluntarily enlisted into the military service of these United States in time of war or drafted by the Federal Government into employment in a defense industry, will be considered upon leave of absence and will accumulate seniority during such service, and upon termination of such service, will be employed in their former classification and at the current rate for such work; provided, they have not been dishonorably discharged from such service with the United States Government and are physically able to do work available; and further provided, they report for work within ninety (90) days of the date they are discharged from such service with the United States Government, and provided the Employer's circumstances have not so changed as to make it impossible to provide their reemployment.

ARTICLE XXXI

NOTICE OF INABILITY TO REPORT TO WORK

Employees who are unable to report to work due to sickness or other unavoidable cause shall report the fact to the Employer at least six (6) hours prior to their scheduled starting time, otherwise as soon as possible prior to that employees starting time. Employees giving notice shall contact a designated member of management. The Company and Union agree to mutually resolve violations and abuses under this Article.

ARTICLE XXXII

BAKERS LOCAL 433 HEALTH AND WELFARE FUND

Section 1. (a) Continuing from the second day of May, 1982, the Employer agrees to make payments to the Bakers Union Local No. 433 Health and Welfare Fund for each employee working in job classifications covered by the said collective bargaining agreement, as follows:

For each hour or portion thereof, for which an employee subject to the collective bargaining agreement receives pay, the Employer shall make a contribution of seventy-nine cents ($.79) to the above named Welfare Fund up to a maximum of forty (40) hours in any week.

The company agrees to maintain the current level of benefits during the term of this agreement when and if the reserve level of the Bakers Local No. 433 Health and Welfare Fund reaches One Hundred Thousand Dollars ($100,000.00) or less.

Effective July 4, 1982, the Employer agrees to make an additional contribution of three cents ($.03) per hour up to a maximum of forty hours in any week for the purpose of increasing the life insurance from Three Thousand Dollars ($3,000.00) to Ten Thousand Dollars ($10,000.00).

Two cents ($.02) per hour of the per hour contribution to the Welfare fund is to pay 100% of the health insurance premium for pensioners under the BCW No. 433 Health and Welfare plan. Such payment of premium will continue to pensioners age 65 or effective date for commencement of Medicare, whichever is sooner. Such applies to future pensioners also.

In the event the local Union decides to secure Health and Welfare coverage from another source, it shall give the Employer thirty (30) days written notice.

For the purposes of this ARTICLE, it is understood that contributions shall be payable on behalf of employees from the first day of employment, whether said employees are permanent, temporary, seasonal or full time or part-time employees, and regardless of whether or not they are members of the Union. It is further understood that each hour paid for, including hours of paid vacation, paid holidays, and other hours for which pay is received by the employee in accordance with the collective bargaining agreement, shall be counted as hours for which contributions are payable.

However, no contributions will be made for those hours taken as time off under the work week credit provisions contained herein when such hours are taken

off in lieu of the accrued credits earned under the work week credit provisions.

(b) The Employer hereby agrees to become a party to the Agreement and Declaration of Trust dated June 8, 1972, establishing the fund, or any duly constituted successor trust fund for this purpose, and agrees to be bound by all the terms and provision of said agreement, a copy of which is annexed to this collective bargaining agreement and made a part hereof. The Employer further agrees irrevocably to designate as its representative on the Board of Trustees of the Fund such trustees as are named in said Agreement and Declaration of Trust as Employer Trustees together with their successors selected in the manner provided in the said Agreement, and agrees to be bound by all the action taken by the said Employer Trustees pursuant to the said Agreement and Declaration of Trust.

(c) The contributions made to the fund shall be used by it to provide welfare benefits effective on the above date for eligible employees and their eligible dependents, if any, in accordance with the applicable plan of such fund.

(d) It is agreed that all contributions shall be made at such times and in such manner as the Trustees require; and the Trustees shall have the authority to have an independent Certified Public Accountant audit the payroll and wage records of the Employer for the purpose of determining the accuracy of contribution to the Welfare Fund.

(e) If the Employer fails to make contributions to the Welfare Fund within thirty (30) days after the date

required by the Trustees, the Local Union, in addition to any rights the trustees may have, shall have the right to take whatever steps are necessary to secure compliance with this ARTICLE, any provisions of the collective bargaining agreement, including the no-strike clause, to the contrary notwithstanding. It is expressly understood that the Employer's liability for payment hereunder shall not be subject to the grievance or arbitration procedure of the collective bargaining agreement and that the no-strike clause, if any, shall not prohibit any action the Union chooses to take to compel payment of contributions. The Employer shall be liable for all costs incurred in collecting the payments due hereunder, together with attorney's fees and such penalties as may be assessed by the Trustee.

Section 2. The parties agree and represent that there is no other agreement between them regarding welfare benefits other than this ARTICLE, presently in effect. The parties further agree that no agreement regarding welfare benefits other than this ARTICLE shall be effective during the period covered by the said collective bargaining agreement, except with the consent of the Board of Trustees, other than the local Union designating that the contributions be made to a different fund.

Section 3. The expiration date of the present collective bargaining agreement between the local Union and the Employer is May 5, 1985. Copies of any renewal or extension agreements will be promptly furnished to the welfare fund office and, if not consistent with this standard collective bargaining clause, can be used by the Trustees as the basis for termination of participation of the Employer.

Section 4. This ARTICLE shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event that the Employer sells, leases, or transfers this Company or any part thereof, or is taken over by assignment, receivership or bankruptcy proceedings, the successor shall be bound by the terms and conditions of this ARTICLE for the life hereof. The Employer shall give notice of the existence of this ARTICLE to any purchaser, transferee, lessee, assignee or other successor in interest. Such notice shall be in writing, with a copy to the Trustees, not later than ten (10) days prior to the effective date of the transaction. The Employer agrees that its failure to so notify its successor and the Trustees will operate to continue its obligations under this ARTICLE.

Section 5. If at any time during the term of this Agreement or any renewal or amendment thereof, there shall be enacted any federal or state laws or regulations requiring the Employer to secure, provide or pay for insurance or welfare benefits or coverage of the type being provided by the fund to employees covered hereunder it is understood that the aforesaid plan of benefits provided by the fund may have to be varied in compliance with such new law. If such law does not permit the fund to assume and discharge the Employer's obligation, the Employer may, upon thirty (30) days written notice to the Union, reopen this Agreement solely for the limited purpose of reviewing the amount of Employer contributions to the fund.

Section 6. All of the foregoing is subject in all respects to the provisions of the Labor-Management Relations Act of 1947, and to any other applicable laws.

Section 7. Benefits under the Baker's Union Local No. 433 Health and Welfare Fund are presently being extended to regular full time salaried employees of the Bakery and Confectionery Worker's International Union of America, Local Union No. 433. The Agreement and Declaration of Trust establishing the Baker's Local Union No. 433 Welfare Fund allows for contributions by such Employer on behalf of such regular full time salaried employees provided said Employer agrees to make such contributions.

ARTICLE XXXIII

PENSION

The Employer agrees to continue to pay to the Baker's Local No. 433 Pension Fund on behalf of each employee covered by this agreement a sum equal to seventy-eight and one-half cents ($.785) per hour for each hour for which said employee receives pay, up to a maximum of forty (40) hours in any week. Effective May 1, 1983, the Employer's contribution will be increased thirteen and one-half cents ($.135) per hour to a total of ninety-two cents ($.92) per hour to increase the pension benefit from Seventeen Dollars ($17.00) per year of accrual service credit to Twenty Dollars ($20.00) per year accrual service credit. Effective May 6, 1984, the Employer's contribution may be increased ten cents ($.10) per hour in the event such amount is necessary according to the actuary to maintain benefits. However, no contributions will be made for those hours taken as time off under the work week credit provisions contained herein

when such hours are taken off in lieu of the accrued credits earned under the work week credit provisions.

The payments shall be used by the Bakers Local No. 433 Pension Fund to provide retirement benefits for eligible employees in accordance with the plan of said Baker's Local No. 433 Pension Fund as determined by the Trustees of said Baker's Local No. 433 Pension Fund to be applied to the eligible employees based on the amount of Employer contribution.

The Employer hereby agrees to become a party to the Agreement and Declaration of Trust establishing the said Bakers Local No. 433 Pension Fund and agrees to be bound by all terms and provisions of the Agreement, a copy of which is annexed to this Agreement and made a part hereof. The Employer further agrees irrevocably to designate as its representatives on the Board of Trustees of the fund such Trustees as are name in said Agreement and Declaration of Trust as Employer Trustees together with their successors selected in the manner provided in the said Agreement, and agrees to be bound by all the action taken by said Employer Trustees pursuant to the said Agreement and Declaration of Trust.

It is understood and agreed that the pension plan referred to herein shall be such as will qualify for approval by the Internal Revenue Service of the United States Treasury Department, so as to allow the Employer an income tax deduction for the contributions paid hereunder.

Employer agrees to process its portion of the retiring employees' pension applications without delay.

ARTICLE XXXIV

SEVERANCE PAY

SECTION 1. It is agreed that each regular full time employee who is displaced from his or her employment by reason of the closing of an entire plant, or the introduction of labor saving equipment, shall be compensated for such displacement providing they have been actively employed by the Employer for a period of at least three (3) years. An eligible employee's compensation for their displacement shall be on the basis of thirty (30) hours of severance pay (at their straight time hourly rate of pay) for each full year of actual employment, commencing with the fourth (4th) year thereof. Payment under this formula shall be limited to a maximum of nine hundred (900) hours severance pay.

SECTION 2. The above described Severance Pay will not be paid to:

(a) Any employee who is offered employment with the Company in another plant of the Employer which is located within a reasonable distance from the employee's place of employment.

(b) Any employee who accepts a job with the Company at any location.

(c) Any employee who voluntarily quits or is discharged for just cause before he is separated from employment by the Company.

(d) Any employee, who at the time of separation, is eligible for a Normal Pension, as provided for under the provisions of the Bakery and Confectionery Union Local #433 Industry Pension Fund.

(e) If any employee subject to Severance Pay is eligible to receive an early retirement or disability pension benefit under the Bakery and Confectionery Workers Union Local #433 Industry Pension Fund, whether or not he or she elects to accept such early retirement or disability benefits, he or she shall receive as severance pay that percentage of severance pay as set forth above which the excess of the Normal Pension Benefit under such Pension Plan over the amount of early retirement or disability benefit, to which he or she is then entitled bears to the Normal Pension. For example, if the Normal Pension Benefit is $100.00 and an employee is entitled to an early retirement or disability benefit of fifty-eight dollars ($58.00), then his or her severance pay will be reduced by fifty-eight percent (58%).

(f) Any employee accepting Severance Pay shall forfeit and cease to have any seniority and recall rights as provided for in this Agreement.

(g) Any employee re-employed after receiving Severance Pay shall be considered a new employee from the date of re-employment.

(h) In the event an eligible employee wishes to remain on the plant seniority list, for the purpose of possible recall, he or she may elect to defer acceptance of his Severance Pay for a period of twelve (12) months. At any time during such period, however, he or she may request their Severance Pay and their right of recall and seniority shall terminate as of that date.

(i) If such employee has not been recalled by the end of such period, he or she shall be paid Severance Pay and their right of recall and seniority shall terminate as of that date.

ARTICLE XXXV

ANTI-DISCRIMINATION

The Employer and the union agree not to discriminate against any individual with respect to compensation, terms or conditions of employment because of such individual's race, color, religion, sex, age or national origin. Nor will they limit, segregate or classify employees in any way to deprive any individual employment opportunity because of race, color, religion, sex, age or national origin.

ARTICLE XXXVI

SUCCESSORS AND ASSIGNS

This Agreement and the provisions herein contained shall be binding upon the parties hereto, their heirs, successors or assigns.

ARTICLE XXXVII

LIMITATIONS

THIS AGREEMENT shall be in full force and effect from May 2, 1982, until May 5, 1985, both dates inclusive. Thereafter, said Agreement shall continue in force and effect unless sixty (60) days notice in writing is given by either party prior to May 5, 1985, until a new Agreement (the terms of which shall become retroactive to the above expiration date) has been consummated and signed, or this Agreement after the above expiration date has, upon written notice, been canceled or terminated by the Employer or by the Union with the sanction of the Bakery

and Confectionery Workers International Union of America.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names on the ___ day of ___, 1983.

METZ BAKING COMPANY

BY: /s/ Illegible
Employer

ITT-CONTINENTAL BAKING COMPANY, INC.

BY: /s/ Illegible
Employer

INTERSTATE BRANDS CORPORATION

BY: /s/ Illegible
Employer

BAKERY AND CONFECTIONERY WORKERS UNION LOCAL #433

BY: /s/ Illegible
Union

/s/ Dave Bell I.B.C.
/s/ Annie C. Moore
/s/ Karl J. Bonowski Jr.
/s/ Illegible

Supreme Court, U.S.
FILED
APR 23 1993
OFFICE OF THE CLERK

No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL NO. 433 BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRY H. SMITH
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STATEMENT OF THE CASE

Respondent, Bakery, Confectionery & Tobacco Workers' Union Local No. 433 (Union), supplements as follows the Statement of the Case set out by Petitioners.

The collective bargaining agreement, which covered the terms and conditions of employment of both the Petitioners and the Intervenors, contained no provision dealing with how to merge or consolidate seniority lists in the event one employer party to the contract sold its business to another employer party to the contract. (Intervenor's Brief in Opposition to Petition for Writ of Certiorari at App. 47-90). This fact was noted by the Trial Court in its decision in the remedy trial (Petition for Writ of Certiorari at App. 12) and by the Court of Appeals in its decision. (Petition for Writ of Certiorari at App. 3).[1]

The issue of how to merge the two work forces was not presented to the jury at the liability trial in either the instructions to the jury or the special verdicts. (Petition for Writ of Certiorari at App. 87-100). The Trial Court in the remedy trial did not find the jury to have decided the merger issue. (Petition for Writ of Certiorari at App. 16). And, the Court of Appeals expressly noted: "the jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to decide who would

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[1] This observation was also made by the arbitrator, who heard the original grievance filed by the Petitioners (Petition for Writ of Certiorari at App. 118); by the Trial Court in its judgment NOV after the liability phase of the case (Petition for Writ of Certiorari at App. 70), and by the concurring and dissenting judge in the opinion in the first appeal. (Petition for Writ of Certiorari at App. 60-1).

have ended up with the jobs after negotiations". (Petition for Writ of Certiorari at App. 5). The issue remained to be resolved in the remedy phase of the proceedings.

In the liability trial, the Union had contended it did not have a duty to engage in negotiations with Respondent, Metz Baking Company (Metz), in 1983 regarding the work force merger issue and had fulfilled its duty toward Petitioners by submitting the issue to arbitration. The jury and, on the first appeal, the Court of Appeals found to the contrary. (Petition for Writ of Certiorari at App. 44-8, 97). As a result on remand, remedies for breach of the duty to negotiate were also before the Trial Court.

Recognizing the need to resolve these matters in the remedy phase of the proceedings, the Court of Appeals gave the District Court on remand specific instructions. The Court stated:

> The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine what would have occurred but for the Union's failure to negotiate. Plaintiffs will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation their remedy would be merely a declaratory judgment and perhaps nominal damages. 826 F.2d 755, 760 n.1.

In regard to these instructions, the Court of Appeals later interpreted them. "We expressly directed the District

Court to determine 'who would have voted to ratify a negotiated solution' so it could ascertain what would have occurred – that is, what the solution would have been – but for the failure to negotiate." (Petition for Writ of Certiorari at App. 4-5).

Pursuant to these directions from the Court of Appeals, the Trial Court determined that if the Union and Metz had negotiated regarding the work force merger issue in 1983, the negotiated solution of the issue would have been to endtail the Petitioners on a merged seniority list. (Petition for Writ of Certiorari at App. 20). Further, the Court found no arbitration to resolve the issue would have been required, if negotiations had occurred. (Petition for Writ of Certiorari at App. 20). The Court of Appeals upheld these findings. (Petition for Writ of Certiorari at App. 6).

Based on those findings, the Trial Court awarded the Petitioners damages in the form of lost wages for the period from the time of their layoffs to June 15, 1983, when it determined the required negotiations would have been completed. (Petition for Writ of Certiorari at App. 20-2). The Trial Court also denied the Petitioners' requests for attorneys' fees and for prejudgment interest. (Petition for Writ of Certiorari at App. 32).

In regard to attorneys' fees, the Court noted:

> Plaintiffs argue that they should be allowed to recover the attorney fees as an element of damages, not as fees per se. Although other circuits have allowed such recovery, *See* e.g. *Scott v. Local Union 377, International Brotherhood of Teamsters, etc.*, 548 F.2d 1244, 1246 (6th Cir. 1977), the Eighth Circuit has expressly held that attorneys'

> fees may not be considered as compensatory damages. *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978). ("Attorney's fees incurred in bringing a § 301 action do not rise to the status of compensatory damages"). (Petition for Writ of Certiorari at App. 29-30).

In its appeal, however, the Petitioners did not raise as an issue or argue that the Trial Court had erred in this conclusion. Rather, Petitioners contended only that the lower court had erred in failing to find "bad faith" action by the Union and Metz sufficient to support an award of attorneys' fees. (App. at 2-7).

On the attorneys' fees issue, the Court of Appeals concluded:

> The Plaintiffs' next argument is that the District Court erred in denying attorneys' fees and prejudgment interest. With regard to attorneys' fees, the Plaintiffs claim that we had already found the Union guilty of bad faith. Therefore, they reason, the District Court was required to award attorneys' fees. The Plaintiffs are straining a bit on this argument. The question of bad faith sufficient to justify an award of attorneys' fees was never before this Court. Assuming for the sake of argument that it was before us and that we found bad faith, whether or not to award attorneys' fees was still within the District Court's discretion, and we do not think that discretion was abused here. (Petition for Writ of Certiorari at App. 8).

Finally, the Trial Court denied Petitioners' request for prejudgment interest. In affirming the Trial Court's decision, the Court of Appeals noted: "Like attorneys' fees, an award of prejudgment interest is within the discretion

of the trial judge; it is never automatic. We see no evidence here that the District Court abused its discretion". (Petition for Writ of Certiorari at App. 8).

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH SECTION 8(d) OF THE NATIONAL LABOR RELATIONS ACT OR ESTABLISHED PRECEDENT UNDER IT.

Petitioners contend the decision of the Court of Appeals conflicts with Section 8(d) of the National Labor Relations Act and runs counter to basic federal labor policy. The Union urges the Petitioners' arguments lack merit for two basic reasons. First, examination of Petitioners' claims reveals that they rest on a fundamental mischaracterization of the jury's findings in the liability phase of this case. Second, the Trial Court's and the Court of Appeals' decisions follow established law of damages, which does not conflict with Section 8(d) of the labor statute. The Union considers both of these reasons for rejecting the Petitioners' position in order.

First, Petitioners claim "the issue presented and decided at the liability trial was the claim of the Petitioners to superior seniority rights as between the two groups of employees". (Petition for Writ of Certiorari at 15-16). Their superior seniority rights according to the Petitioners stemmed from the provisions of the collective bargaining agreement between the Union and their former employer, which contract Metz had been found by the jury to have assumed. The Petitioners contend the

Trial Court and the Court of Appeals stripped them of these rights in their decisions in a manner which conflicts with Section 8(d) of the NLRA because their contract rights can be altered only through actual negotiations between the Union and their new employer, Metz, and no negotiations ever occurred.[2] And, in turn, the Petitioners' damages must be measured based on their "superior seniority" rights under that contract (i.e. their rights to have continued in employment from March, 1983, to the present time and beyond), until those rights are lawfully altered pursuant to Section 8(d), and cannot be measured by the "hypothetical" negotiated settlement of the work force issue used by the Trial Court in determining damages.

The Petitioners' argument is based on a fundamental mischaracterization of the jury's findings in the liability trial. In its opinion, the Court of Appeals specifically found: "the jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to

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[2] At the same time, the Petitioners also argue that even the Union and Metz could not have negotiated a change in their seniority rights because they lacked "objective justification" to do so. (Petition for Writ of Certiorari at 19). This notion of the Petitioners also lacks merit. Intervenors, too, had a contract and seniority rights with Metz. Metz survived the sale as the employer. And, the Intervenors were performing the same work after the sale and consolidation of operations as before those events took place. Those facts provide ample grounds to alter Petitioners' claimed superior seniority rights in negotiations. And, negotiations to do so would not have fallen outside the Union's "wide range" of discretion in negotiating a reasonable solution to the merger issue. *Air Line Pilots Ass'n. Int'l. v. O'Neill*, 499 U.S. ___, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991).

decide who would have ended up with the jobs after negotiations". (Petition for Writ of Certiorari at App. 5). This finding is in direct conflict with the Petitioners' assertion that the jury in the liability trial had determined that they possessed seniority rights superior to those of the Metz workers at the Leavenworth Street plant. Brief review of the record supports the finding of the Court of Appeals, not Petitioners' claim.

The parties' pre-trial order does not identify the merger of the seniority of the two employee groups as a triable issue at the liability trial. (Petition for Writ of Certiorari at App. 101-112). The jury's special verdicts do not ask the jury to determine the merger issue. The instructions to the jury do not refer to the possible methods for combining the seniority lists of the two groups. (Petition for Writ of Certiorari at App. 87-100). Post trial first in 1985 and in a later pre-trial order, the basis (dovetailing, endtailing, etc.) upon which damages were to be computed was identified as a remedy issue. (App. 10, 20). And, in its opinion in the first appeal, the Court of Appeals suggested dovetailing as a possible solution to the merger issue. (Petition for Writ of Certiorari at App. 47). In short, the record amply justifies the finding of the Court of Appeals that the jury *did not* grant the Petitioners seniority rights superior to those of the Intervenors in its verdicts.

Put succinctly, because the jury had not granted the Petitioners seniority rights superior to those of the Intervenors, no "superior seniority" rights of the Petitioners existed, which either the Trial Court or the Court of Appeals could take away. Accordingly, the decisions of the Trial Court and the Court of Appeals did not conflict

with the terms of Section 8(d) of the NLRA, since they did not alter or modify any existing rights of the Petitioners under any collective bargaining agreement.

Second, the Trial Court's and Court of Appeals' decisions follow the established law of damages in fair representation cases. And, application of those doctrines to the Petitioners' claims in this case does not conflict with Section 8(d) of the NLRA. Examination of relevant precedent, consideration of the Courts' findings and analysis of the rulings' relationship, if any, to Section 8(d) support the Union's position.

In its ruling in the first appeal, the Court of Appeals remanded the action to the District Court "for determination of relief". (Petition for Writ of Certiorari at App. 58). In regard to suits claiming a breach of a union's duty of fair representation, remedies "should be fashioned to make the injured employee whole". *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 49, 99 S.Ct. 2121, 2126, 60 L.Ed.2d 698, 705 (1979). In turn, an "appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach". *Vaca v. Sipes*, 386 U.S. 171, 195, 87 S.Ct. 903, 919, 17 L.Ed.2d 842, 861 (1967). And, specifically in regard to damage remedies, this Court in employment-related cases has held that an injured worker should be returned only to the position the employee would have been in but for the illegal conduct. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed.2d 1271 (1941).

The jury, with the approval of the Court of Appeals, had determined that the Union had acted wrongfully in

failing to negotiate with Metz regarding the work force merger issue in 1983, and, instead, in submitting the issue directly to an arbitration.[3] As a result, the Trial Court and the Court of Appeals in their rulings simply determined what would have taken place but for the Union's improper conduct in 1983. Finding the answer to that inquiry, the Union urges, was mandated by this Court's precedent, since it comprised the only way to make the Petitioners whole for their loses due to the Union's breach of its duty.[4] And, these rulings do not conflict with Section 8(d) of the NLRA.

In *NLRB v. American Insurance Co.*, this Court set out the genesis and purpose of Section 8(d) in its present form. The Court explained:

> In 1947, the fear was expressed in Congress that the board "has gone very far, in the guise of

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[3] The Union did not attempt to negotiate with Metz over the issue in 1983 because it did not believe a negotiated resolution of the work force issue could be reached fairly. In turn, it did not believe it had a duty to bargain over the matter and submitted it instead to arbitration. The jury faulted this reasoning, apparently believing the affected employees should have been allowed to decide the merger issue. The Union has consistently noted a negotiated resolution of the merger issue would preclude an arbitrated solution. (App. at 13).

[4] The Petitioners assumed before the Trial Court, the Court of Appeals and this Court that the jury had awarded them seniority rights superior to the Intervenors and had determined that negotiations would necessarily have produced a result giving them the disputed jobs. Based on those assumptions, the Petitioners never attempted to prove anything further in regard to the causal link between the Union's conduct and their damages as the Court's precedent requires.

> determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make." Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require submission of counter-proposals. As amended in the Senate and passed as the Taft-Hartly Act, the good faith test of bargaining was retained and written into Section 8(d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.
>
> Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed., 1027, 1037 (1952).

In turn, the rulings of the lower courts in these proceedings did now run afoul of the provisions of Section 8(d) because they do not force contract terms upon unwilling parties but only make a calculation of damages based upon the terms of a collective bargaining agreement to which the parties to the contract would likely have agreed in negotiations. *International Union of Electrical,*

Radio and Machine Workers v. NLRB, 426 F.2d 1243 (DC Cir. 1969) *cert. denied* 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed.2d 256 (1970) *appeal on remand* 502 F.2d 349 *cert. denied* 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed.2d. 226 (1974), 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975). (426 Fed. 2d 1243 at 1252: "The Board cannot be faulted on the ground that it is imposing contract terms upon an unwilling employer when it is engaged only in a determination of a means of calculating a remedy to compensate for injury sustained from an unfair (and unlawful) labor practice.")

In short, the Petitioners' claim that the decision ofthe Court of Appeals conflicts with Section 8(d) of the NLRA lacks merit because the ruling simply follows and applies the relevant law of damages. And, following that precedent does not conflict with Section 8(d) because it does not result in compelling either the Union or Metz to accept any contract terms.

In summary, the Petitioners' argument that the Court of Appeals' decision is contrary to the dictates of Section 8(d) of the NLRA misses its mark. The argument rests on the incorrect assertions that the jury had granted the Petitioners seniority rights superior to those of the Intervenors and that the Courts took those contractual rights away from them without bargaining. Further, the argument ignores the fact that the Court of Appeals' decision follows established law of damages and does not, in turn, unlawfully impose any new contract terms on the parties to any collective bargaining agreement, which is the vice, which Section 8(d) is intended to eliminate.

II. THE PETITIONERS HAVE NOT PRESERVED AN ISSUE REGARDING THE COURT OF APPEALS' RULING ON THEIR REQUEST FOR ATTORNEYS' FEES

The Petitioners argue a split in the Circuit Courts exists on whether attorneys' fees comprise an element of compensatory damages in an action involving the breach of a union's duty of fair representation. (*See citations* Petition for Writ of Certiorari at 20-4). The Petitioners, however, did not preserve that issue in the Court of Appeals to permit review by this Court. Brief review of the proceedings below supports the Union's position.

The Trial Court did note that the Eighth Circuit Court of Appeals has held that attorneys' fees do not comprise an element of compensatory damages in this type of case. The Trial Court further found the Petitioners had not demonstrated "bad faith" by the Union and Metz to warrant awarding attorneys' fees otherwise. In the Court of Appeals, the Petitioners did not raise as an issue or argue that the Trial Court had erred in finding attorneys' fees did not constitute an element of damages. Rather, the Petitioners argued the impropriety of the Trial Court's findings concerning "bad faith". (App. at 2-7). Correspondingly, the Court of Appeals limited its opinion to discussing and affirming the Trial Court's ruling on the "bad faith" issue. The Petitioners simply ignore the state of the record in this regard in their Petition before this Court.

The Union urges the Petitioners' failure to present the compensatory damage issue to the Court of Appeals compromises a fatal defect in its position before this

Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 147 n.2, 90 S.Ct. 1598, 1602 n.2, 26 L.Ed.2d 142, 148 n.2 (1970).

III. PETITIONERS' CLAIM FOR PREJUDGMENT INTEREST PRESENTS NO SUBSTANTIAL QUESTION REQUIRING REVIEW BY THE COURT

The Petitioners urge the Court to review the Trial Court's and the Court of Appeals' decision not to award them prejudgment interest. They invite the Court to require the federal courts in actions involving a breach of a union's duty of fair representation to follow the current policy of the National Labor Relations Board, which the Petitioners note is to grant prejudgment interest on all backpay awards.

The Union urges the Court of Appeals' ruling presents no substantial issue requiring the Court's review and certainly not necessitating the Court's restriction of federal court discretion in fair representation suits. Consideration of established law and the facts in this case demonstrates the Court of Appeals' decision does not present a substantial issue requiring review by this Court. Further, requiring the federal courts to follow current National Labor Relations Board policy is improper. The Union considers both facets of its position in turn.

Foremost, it is well established that an award of prejudgment interest is within the Trial Court's discretion. *Blau v. Lehman*, 368 U.S. 403, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962); *Board of Commissioners of the County of Jackson*

v. United States, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313 (1939). The Court of Appeals concluded the Trial Court did not abuse its discretion in refusing to award the Petitioners prejudgment interest. (Petition for Writ of Certiorari at App. 8). Brief review of the relevant facts in these proceedings supports the Court of Appeals' conclusions.

The proceedings below did not permit the amount of damages to be ascertained until the remedy phase of the case. From its issuance in 1983 to July 16, 1985, the original decision by Arbitrator Doyle, which upheld the endtailing of the Petitioners, had determined the rights of the parties. Again, Doyle's ruling was resurrected and clearly in effect between the ruling on the Motions for Judgment NOV on August 13, 1986, and the Court's decision in the first appeal in August, 1987. Given those circumstances, the question as to whether any damages might be owing to the Petitioners was uncertain for significant periods of time in this litigation. In turn, denying prejudgment interest was proper, since determining damages earlier was not possible. *Laday v. Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 422 F.2d 1168, 1171-72 (7th Cr. 1970).

Further, in the remedy trial, the basis for computing damages remained an issue. (App. at 10, 20). Additionally, issues regarding mitigation of damages and deductions from back pay awards remained subject to decision by the Court and proof at the remedy trial. (App. at 14-24). Accordingly, the issues to be decided in regard to damages in this case precluded finding that the damages owing were readily ascertainable prior to trial, since

those issues involved basic questions regarding the basis for computing the damages, the proper elements of the damages and specific individuals' entitlement to damages. Accordingly, the Court of Appeals correctly concluded denying prejudgment interest did not comprise an abuse of discretion by the Trial Court because "the damages were unliquidated and could not be ascertained prior to judgment". *Noranda Aluminum Inc. v. United Bhd. of Carpenters*, 528 F.2d 1304, 1310 (8th Cir. 1976) *cert. denied* 429 U.S. 835, 97 S.Ct. 101, 50 L.Ed.2d 100 (1976).

Since the amount of damages owing remained uncertain up to the time of the remedy trial, allowing prejudgment interest would be unfair for two reasons. First, such an award running from 1983 would have substantially increased the damages owing and would make the Petitioners more than whole. In turn, denying prejudgment interest is fair because otherwise the award would be penal, not compensatory, in nature. *IAM Lodges 743 and 1746 v. United Aircraft Corp.*, 534 F.2d 422, 447 (2d Cir. 1975) *cert. denied* 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976).

Second, any delay in ultimately ascertaining the damages owing results to a large degree from the uncertainty as to liability. Further, after liability was established in 1987, the magnitude of the damage claims by the Petitioners (back pay and future damages for 40 people) made substantial preparation concerning them necessary. In turn, awarding prejudgment interest would have been inequitable, since the Union and Metz did not improperly contribute to the delay.

The Union urges the Trial Court did not abuse its discretion in failing to award the Petitioners prejudgment interest because the inability to ascertain the damages owing, if any, prior to the remedy phase of the trial made an award of interest patently unfair. And, in turn, the Court of Appeals acted properly in upholding the Trial Court's decision.

In short, the Petitioners' request for review of the Court of Appeals' ruling concerning prejudgment interest enmeshes this Court in a very fact specific review of the record to determine whether the rulings in the lower courts comprise an abuse of discretion. Accordingly, the Petitioners' request presents no substantial legal issue by its nature. And, under the circumstances, the request has no basis on the merits, since the Court of Appeals correctly concluded the Trial Court did not abuse its discretion.

The Petitioners seek to overcome these conclusions in regard to the prejudgment interest issue by urging the Court to require the federal courts in duty of fair representation actions to follow current National Labor Relations Board policy concerning interest on backpay awards. The Union submits the court should reject the Petitioners' invitation on, at least, three grounds.

First, the National Labor Relations Board's current policy in regard to interest on backpay awards is simply part of the agency's discretionary power to fashion remedies for unfair labor practices, which it believes will effectuate the purposes of the National Labor Relations Act. *E.g. NLRB v. My Store, Inc.*, 468 F.2d 1146, 1152 (7th

Cir. 1972); *NLRB v. Zimnox Coal, Co.*, 336 F.2d 516, 518 (6th Cir. 1964); *Marshfield Steel Co. v. NLRB*, 324 F.2d 333 (8th Cir. 1963)[5] But, even the Board's discretion is limited. This Court has held the National Labor Relations Board cannot simply apply its usual remedy in every case without regard to the circumstances of a particular matter. *NLRB v. Dist. 50, United Mine Workers*, 355 U.S. 453, 78 S.Ct. 386, 2 L.Ed.2d 401 (1958). In essence, then, contrary to the Petitioners' suggestion, the National Labor Relations Board's current policy, like current case law, is at core discretionary. In turn, the Petitioners' proposal to require the federal courts to follow the policy in all fair representation cases involves no significant change in the applicable standard for awarding prejudgment interest, since even under the Board rule the Courts must determine whether an award of interest is appropriate under the facts of a particular case.

Second, this Court has expressly held that the federal courts are not pre-empted by the NLRA from hearing claims involving a claimed breach of a union's duty of fair representation. *Breininger v. Sheet Metal Workers Int'l. Ass'n. Local No. 6*, 493 U.S. 67, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989). In so holding, the Court has noted the separate and distinct interest of the National Labor Relations Board in enforcing federal labor policy from that of the federal courts in providing an injured worker vindication of individual contract rights. *Vaca v. Sipes*, 386 U.S. 171, 195-97, 87 S.Ct. 903, 919-20, 17 L.Ed.2d 842, 851-53 (1967).

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[5] Notably, as stated in these decisions, the National Labor Relations Board did not award interest on backpay awards for many years but changed that practice as a matter of policy.

The Petitioners' argument that the federal courts should be required to follow the Board's policy, in turn, runs counter to this established precedent, since it effectively places the courts in the business of enforcing statutory rights rather than contract rights.

Finally, in this case, the National Labor Relations Board, in fact, refused to issue a complaint when the Petitioners filed an unfair labor practice charge regarding the facts of this case. (App. at 25-27). As a result, requiring the lower courts to apply the National Labor Relations Board policy in this case makes little sense, since the Board has determined to do so is not necessary to effectuate the purposes of the National Labor Relations Act.

In summary, the Union urges the Trial Court's and the Court of Appeals' refusal to award the Petitioners prejudgment interest presents no substantial issue warranting review by this court because such review would involve nothing more than a factual review of the record for abuse of discretion. Further, the Petitioners' invitation to the Court to require federal courts in duty of fair representation actions to apply the current National Labor Relations Board policy on prejudgment interest should be rejected, since the Board's policy is itself discretionary, since the suggested restriction on the courts' discretion runs counter to established precedent, and since the award of interest is not needed in this case to effectuate federal labor policy.

CONCLUSION

For the foregoing reasons, the Union urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX OF RESPONDENT BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL NO. 433

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3549
91-3553
92-1563
92-1591

SELMAN (JOE) THOMAS, JR., et al.
Plaintiffs-Appellants/
Cross-Appellees.

vs.

BAKERY, CONFECTIONERY AND TOBACCO
WORKERS UNION LOCAL NO. 433 and
METZ BAKING COMPANY,

Defendants-Appellees

and

CURTIS BURTON, et al.,

Intervenors-Appellees/
Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEBRASKA

BRIEF OF APPELLANTS/CROSS-APPELLEES

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* * *

IV.

THE DISTRICT COURT ERRED IN FAILING TO AWARD PLAINTIFFS ATTORNEY FEES

The District Court, in its Memorandum Opinion, at 18-19 determined that attorney fees could only be awarded in this action if there was a finding of bad faith and there was no evidence of such in this action. The Trial Court cited *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975) and *Actors Equity Association v. American Dinner Theatre Institute*, 802 F.2d 1038 (8th Cir. 1986) as supportive of its position. A review of the District Court's determination regarding the awarding of attorney fees is usually reviewed under the clearly erroneous standard. *Actors Equity, supra.* Not so with regard to this action. The District Court, in refusing to award attorney fees to the Plaintiffs, violated the law of the case doctrine. See *Bethea v. Levi Strauss, supra.* The District Court is required to conform its opinion and decision to the spirit and intent of the prior Appellate Court's decision. *Houghton v. McDonnell Douglas Corporation, supra.*

This Court's prior Opinion found that the Union had lied to and deceived the Plaintiffs. It further found that the Union was guilty of bad faith. A determination of bad faith in a §301 action constitutes an exception to the "American Rule" that attorney fees are ordinarily not recoverable by the prevailing party in federal litigation absent statutory authorization. *Richardson v. Communication Workers of America, AFL-CIO*, 530 F.2d 126, 132-33, (8th Cir. 1976) specifically addressed this issue. This Court determined that a prior finding of bad faith in a §301 action, wherein an employee was suing his union for

breach of its duty to fairly represent him entitled the Plaintiff to an attorney fee award. This action stands on an identical footing.

The cases referred to by the Trial Court are inapposite because these cases either dealt with a situation where bad faith was not established or the cases did not involve an employee suing the union with regard to a breach of duty of fair representation. Even under the clearly erroneous standard, the District Court erred in not awarding attorney fees. Both the Union and Metz were guilty of bad faith with regard to the events which transpired prior to the commencement of this litigation and during the course of this litigation.

Metz signed an agreement with IBC to purchase the Leavenworth Street facility and to assume the IBC collective bargaining agreement in question, *in toto*. Immediately after execution of that purchase agreement, Metz claimed that Plaintiffs were entitled only to be treated as "new-hires". Metz continued this charade through the course of the arbitration, as reflected by Mr. Lessman's testimony at the liability trial (Ex. 74-A (REC.T:301) T:298), and up to and including the testimony of Mr. Metz at the damage trial (T:383:L.10-394:L.13).

Whether there was ever an agreement, either explicit or implicit, between the Union and Metz as to the handling of the arbitration to assure the defeat of the position adopted by the Plaintiffs will, apparently, never be known. Plaintiffs submit that the testimony of Mr. Lessman, Metz' General Counsel, and Mr. Smith, the Union's attorney, at the liability trial does suggest that such an agreement was made between Metz and the Union.

At the liability trial Mr. Lessman testified that prior to the arbitration hearing he never recalled having any conversations with Mr. Harry Smith regarding the former IBC employees' status or the lay-offs (Ex. 74-A (Rec.T:301) T:99-100; 105-6). He indicated that he seldom dealt with Mr. Smith.

Mr. Smith testified that he had dealt with Mr. Lessman before and that Mr. Lessman's word was good (Ex. 74-A (Rec.T:301) T:164). Mr. Smith later testified as to a telephone conference which he had with Mr. Lessman wherein Mr. Lessman indicated that the sale between IBC and Metz was an asset sale and that in the conversation Mr. Smith had indicated to Mr. Lessman that the only fair thing to do was to go to arbitration and that the two generally discussed theories of the case (Ex. 74-A (Rec.T:301) T:165-66). Thereafter, Mr. Lessman testified, after listening to Mr. Smith, that his memory had been refreshed and that he now recalled not a telephone conference with Mr. Smith but a meeting with Mr. Smith in Mr. Smith's office where the parties reviewed cases and discussed theory regarding this matter. He did not recall reviewing the purchase agreement between IBC and Metz with Mr. Smith, at least he was pretty sure he did not do this (Ex.74-B (Rec.T:301) T:300; 302; 303-4).

As Plaintiffs indicated in their brief submitted with regard to the prior appeal, it is doubtful that anyone on the jury believed that Mr. Smith had never reviewed the purchase agreement between IBC and Metz and that both Metz and the Union intentionally chose to withhold essential facts during the course of the arbitration hearing. That the Union otherwise lied to the Plaintiffs, deceived them and was guilty of bad faith is amply reflected in this Court's prior Opinion.

Both Metz and the Union have been guilty of bad faith with regard to the conduct in this litigation. In December of 1985 the parties entered into a Joint Stipulation identifying the issues with regard to the damage portion of this action. (Joint Appendix at 143). Neither Metz nor the Union have ever abided by this stipulation. In fact when allowed by the Magistrate to amend their answers solely with regard to the affirmative defense of mitigation of damages (Joint Appendix at 247) both Defendants, in their amended answers (Joint Appendix at 263 and 293) raised, without leave of Court the following affirmative defenses: election of remedy; waiver; estoppel; res judicata; collateral estoppel; accord and satisfaction and, the defense which the Trial Court adopted in its interpretation of footnote 1, that if negotiations had been undertaken the Plaintiffs' seniority would have been abrogated, Plaintiffs' end-tailed to the Metz workers and that, therefore the Plaintiffs were barred from any recovery.

Interestingly, most of these defenses arose by reason of a severance pay arbitration originated by the Union (not Plaintiffs) and conducted by Metz and the Union which had its genesis in another law suit between the parties, Selman (Joe) Thomas vs. Interstate Brands Corporation, (Metz defended for IBC) CV83-0-560. This litigation produced a hearing before the late Honorable Richard E. Robinson, the transcript of which is found at Ex. 103d (Rec.T:407).

It is readily apparent that then counsel for Metz, Joe P. Cashen, then counsel for the Union, Harry S. Smith and then counsel for the Plaintiffs, the late Dayton O. Rassmussen, Jr., reached an agreement, in open Court, that the matter of severance pay was not to affect or

impact this litigation (Ex. 103d (Rec.T:407) at 1-14, 38, 40-41). Additionally, Ex. 75 (Rec.T:403-4), a letter from Mr. Kim B. Murphy, in-house counsel for Metz, notified Mr. Burke (a Plaintiff herein) that accepting severance pay would not affect his status in the instant litigation. The Defendant Metz and the Union have simply raised issues which they agreed, in open Court, in another proceeding, that they would not raise.

Both Metz and the Union submitted a second Pre-Trial Order (Joint Appendix at 345) to the lower court inclusive of these issues and contrary to the Joint Stipulation of the parties. The transcript of the final pre-trial conference (Joint Appendix at 388 (at 18-19, 41)) reflects that counsel for the Plaintiffs refused to sign the proposed pre-trial conference order until directed to do so by the Magistrate. The actions of the defendants in raising the issues thus raised, while previously agreeing, on two separate occasions not to so raise these issues, is frivolous and vexatious. Attorney fees are, therefore, properly to be awarded. *Hoover v. Armco, Inc.*, 915 F.2d 355, 357 (8th Cir. 1990) Cert. denied, 111 S.Ct. 1585, 113 L.Ed.2d 650 (1991). A review of the docket sheet in this action reflects the fervor with which the Defendant Metz has continued to litigate these types of issues from the time of remand through the date of the remedy/damage trial.

The District Court's denial of an award of attorney fees even if bad faith had not already been established in the prior liability trial and Circuit Opinion was clearly erroneous.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al. Plaintiff, vs. BAKERY, CONFECTIONERY AND TOBACCO WORKERS UNION LOCAL NO. 433, and METZ BAKING COMPANY, Defendant.	Civil Action 83-0-652 JOINT STIPULATION (Filed December 3, 1985)

COME NOW the plaintiffs by and through their attorney, Thomas J. Young, the Defendant, Bakery, Confectionery and Tobacco Workers Union Local No. 433, by and through its attorneys, MacDonald Smith and John F. Clemens and the Defendant, Metz Baking Company, by and through its attorney, Joe P. Cashen and stipulate and agree as follows:

That the parties hereto wish to submit to the Court issues of law with regard to the damage/remedy portion of this action in order to expedite this action and do hereby agree and stipulate that the following legal issues should be determined by the Court and will control the damage/remedy portion of this action but reserve all objections which each party may have arising by reason of the Court's ruling with regard to said legal issues.

The issues to be determined by the Court are as follows:

1. Whether ordering a new arbitration comprises the appropriate remedy.

2. If so, whether the Court should retain jurisdiction to enforce or vacate the new arbitration award.

3. Even if a new arbitration does not comprise an appropriate remedy, whether Plaintiffs' damages should be measured by what they would have received as a remedy in a fair arbitration.

4. If damages comprise the appropriate remedy, are any or all of the following items to be utilized in determining gross back pay due each Plaintiff:

a. Wages.

b. Overtime pay.

c. Night pay.

d. Earned work credits.

e. Holidays.

f. Vacations.

g. Pension contributions.

h. Life insurance contribution.

i. Health insurance contribution.

j. Medical expenses actually incurred.

k. Seniority rights.

l. Any other "fringe benefit".

5. Are interim earnings of the Plaintiffs to be deducted from the amount of gross back pay due each Plaintiff.

6. Do interim earnings include any or all of the following items:

a. Wages.

b. Overtime pay.

c. Night pay.

d. Earned work credits.

e. Holidays.

f. Vacations.

g. Pension contributions

h. Life insurance contribution.

i. Health insurance contribution.

j. Medical expenses actually paid.

k. Seniority rights.

l. Any other "fringe benefit".

m. Severance pay received from Metz.

n. Pension benefits received.

o. Unemployment compensation benefits received.

p. Any other public or private assistance benefits received.

7. Who has the burden of proving interim earnings, Plaintiffs or Defendants.

8. If the burden of proof is upon the Defendants with regard to interim earnings and Defendants are not

allowed to amend their answers to include the defense of mitigation of damages, are the Defendants allowed to introduce evidence with regard to interim earnings under their pleadings as they presently exist.

9. Are the Defendants to be granted leave to amend their answers to allege that the Plaintiffs have failed to mitigate their damages.

10. If mitigation of damages is an issue, is each Plaintiff required to at least make reasonable efforts to find new employment which is substantially equivalent to the position lost and which is suitable to a person of his/her background and experience.

11. If mitigation of damages is an issue, are offers from Metz to some of the Plaintiffs for part time work without the benefit of seniority or fringe benefits offers of substantially equivalent employment.

12. Is reinstatement, in any form, an appropriate remedy to be enforced in this action.

13. If reinstatement is an appropriate remedy in this action, how is reinstatement to be accomplished.

14. In the event that back pay, reinstatement or future damages are found to be an appropriate remedy in this action, what is the basis for the consideration of such from the standpoint of seniority by reason of "end-tailing", "dove-tailing" or "plant-wide seniority" of IBC employees with Metz employees being "end-tailed".

15. Is an award for future damages an appropriate remedy in this instance.

16. If future damages are to be awarded, are the following elements of future damages:

a. The period of time for which Plaintiff would likely have continued in the employ of the Defendant Metz in the absence of the unlawful discharge.

b. The value of wages, overtime pay and such fringe benefits as seniority rights, paid vacations, insurance benefits, pension and retirement benefits which each Plaintiff could reasonably have expected to received during such period of employment.

c. Deducted from the sum found in b., above, is to be the value of compensation and fringe benefits which an individual, with each Plaintiff's earning capacity, could reasonably be expected, in the exercise of due diligence, to receive from other available employment during this period. Each Plaintiff's present employment is not necessarily such other available employment, but may be given consideration.

d. Is the net amount found by deducting c. from b. to be reduced to its present value.

17. Are attorney fees to be allowed in this action for Plaintiffs' attorney.

18. If attorney fees are to be allowed for Plaintiffs' attorney, will same be awarded on the basis of:

a. A fair and reasonable hourly rate for the attorney times the actual number of hours expended in this action on behalf of the Plaintiffs;

or

b. The time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal services properly; the preclusion of other employment by the attorney due to acceptance of this case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and the ability of the attorney; the "undesirablity" of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

19. If back pay is awarded in this action, are the Plaintiffs to be allowed prejudgment interest.

20. In any damage award in this action, are the damages to be apportioned between the Defendant Metz and Defendant Union and if so, the method by which damages are to be apportioned. Defendant Union contends that the submission of the apportionment of damages issue is premature at this time.

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APPENDIX C

* * *

[p. 24] fact not in evidence, calls for speculation, and I believe it would also require him to testify as to what somebody else would have done. It's hearsay, too.

THE COURT: Overruled. He may answer.

Q. (By Mr. Danberg) Mr. Church?

A. Yes, it would have.

Q. After a contract has been altered, in your opinion, is that a subject on which grievances maybe submitted?

A. No.

Q. What has the position of the union been, if there has been one, with respect to grievances concerning contractual changes, that is grievances after contractual changes that have been ratified?

A. The union position is that a vote of the people in a ratification meeting, the contract would be set.

To do it any other way, you would never have a contracts, because there is always somebody unhappy about part of the contract.

It happens – it has happened quite a few times, but we would generally not process that grievance.

Q. Mr. Church, I want to invite your attention for just a moment to one aspect of the fringe benefits claimed by the plaintiffs in this case and that is the subject of life insurance.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al., Plaintiffs, vs. BAKERY, CONFECTIONERY, AND TOBACCO WORKERS UNION LOCAL NO. 433, et al. Defendants, and CURTIS BURTON, et al., Intervenors.	CV. NO. 83-0-652 ORDER ON PRETRIAL CONFERENCE (Filed March 9, 1990)

A final pre-trial conference was held on the 9th day of March, 1990. Appearing for the parties as counsel were: Plaintiffs, Thomas J. Young, One Pacific Place, 1125 South 103rd Street, Suite 710, Omaha, Nebraska 68114; Defendant Metz Baking Company, Neil B. Danberg, Jr. and William T. Oakes, 10306 Regency Parkway Drive, Omaha, Nebraska 68114; Defendant Bakery, Confectionery and Tobacco Workers Union, Local No. 433, MacDonald Smith, 632-640 Badgerow Building, Sioux City, Iowa 51101; and Intervenors, Maynard H. Weinberg, 8901 Indian Hills Drive, Suite One, Omaha, Nebraska 68114.

A. Exhibits in Evidence.

Exhibit lists will be prepared by each party for submission to the Court and all other parties on or before April 16, 1990.

B. Foundation for Exhibits.

The stipulation or waiver of foundation for all exhibits will be indicated on the exhibit lists to be submitted pursuant to A above.

C. Uncontroverted Facts.

The parties have agreed that the following may be accepted as established facts for purposes of this case only: (~~See attached list~~ *none*).

D. Controverted or Unresolved Issues.

1. Whether the case should be remanded to arbitration (and, if so, what issues should be remanded and whether the Court will retain jurisdiction to enforce or vacate the award; and, if not, whether Plaintiffs' damages should be measured by what they would have received as a remedy in a fair arbitration).

2. Whether Plaintiffs have made reasonable efforts to mitigate their damages (if mitigation is an issue, and if not, what consequence or effects will this have on Plaintiffs' claimed damages).

3. Are Plaintiffs entitled to any back pay and, if so, how will it be calculated (and what amount of interim

earnings, if any, should be deducted and how will interim earnings be calculated).

4. Is reinstatement or reemployment, in any form, an appropriate remedy in this action (and, if so, how is reinstatement or reemployment to be accomplished, and what effect, if any, do Metz' offers of employment to certain of the Plaintiffs have upon this issue).

5. Are Plaintiffs entitled to any future damages and, if so, how will they be computed?

6. Are Plaintiffs entitled to prejudgment interest and, if so, how will it be computed?

7. Are Plaintiffs entitled to an award of attorney's fees against the Union and, if so, how will they be computed?

8. Are Plaintiffs entitled to an award of attorney's fees against Metz and, if so, how will they be computed?

9. In any damage award in this action, are the damages to be apportioned between Metz and the Union and, if so, by what method are damages to be apportioned?

UNION, METZ AND INTERVENORS BUT NOT PLAINTIFFS BELIEVE THE FOLLOWING ARE CONTROVERTED ISSUES:

10. Whether plaintiffs are entitled to any damages?

11. What damages, if any, have plaintiffs sustained that were proximately caused by defendants' actions?

12. Whether plaintiffs were fully and fairly represented at the arbitration hearings and therefore this court lacks jurisdiction?

13. Which of plaintiffs have dropped out of the work force, or have had their employment terminated, as of what date, and does this stop their claim for damages?

14. Whether if this case is returned to arbitration, the arbitrator should consider all remaining issues with regard to causation and remedies including, but not limited to, issues relating to what would have occurred in negotiations and collective bargaining, whether a new agreement would have been reached, and how it would have resolved seniority issues, and what effect, if any, the purchase agreement would have on the arbitral process?

15. Is Metz required to continue to make payments into the Union pension fund for the benefit of any plaintiff who has retired and drawn benefits if the pension plan specifies that an individual may not be employed by Metz and simultaneously draw retirement benefits?

16. What are the legal effects of the offers of full-time Metz employment to certain of the plaintiffs with respect to claims for back pay, reinstatement/reemployment, future damages or other claimed damages?

17. Whether ordering new arbitration(s) or new negotiations comprises the appropriate remedies herein?

18. Whether negotiation is a proper remedy for determining the seniority rights of plaintiffs?

19. What is the legal effect of plaintiffs' failure to arbitrate their alleged rights to jobs at Metz following their layoffs and what is the legal effect of plaintiffs' failure to arbitrate their alleged seniority rights based upon seniority lists of Metz following their layoffs?

20. What would have happened if there had been negotiations between Metz and the Union on or about February/March 1983?

21. If there had been a vote on the subject of merging the work force of Metz and IBC in Omaha, what would have occurred?

22. If the Metz workers out-voted the IBC workers in the collective bargaining process, what would have been the results of such a vote?

23. Are the plaintiffs "new hires" with respect to Metz in February of 1983, and, if so, how long should and would Metz have employed them?

24. If plaintiffs were not "new hires" of Metz as of February of 1983, what is the nature and extent of their seniority compared to that of existing Metz workers at that time?

25. Whether plaintiffs or some of them are barred from claiming damages in view of the defenses of res judicata, collateral estoppel, election of remedies, waiver, estoppel and accord and satisfaction:

25a. Whether arbitrator James A. Doyle's Decision dated December 15, 1983 represents full and final adjudication of plaintiffs' claims for relief with respect to both severance pay and/or seniority rights and therefore those claims are barred by res judicata and collateral estoppel?

25b. Is the claim of 37 plaintiffs for severance pay inconsistent with their claim against Metz for lost seniority and have said plaintiffs elected a remedy by accepting severance pay?

25c. Whether pursuit and acceptance by plaintiffs of severance pay constituted a waiver, estopped plaintiffs from further inconsistent remedies, or represented an accord and satisfaction with respect to their seniority rights and severance pay and therefore bars plaintiffs from further relief?

PLAINTIFFS BUT NOT UNION AND METZ NOR INTERVENOR BELIEVE THESE ARE CONTROVERTED ISSUES:

26. Is mitigation of damages a defense which defendants ~~have~~ *can* properly ~~raised~~ *assert*?

27. Whether there are damages or relief to be awarded to the plaintiffs from the defendant Union with regard to the Union's failure to negotiate with the Defendant Metz regarding plaintiffs' seniority?

28. In the event that back pay, reinstatement, or future damages are found to be an appropriate remedy in this action, what is the basis for the consideration of such from the standpoint of seniority by reason of "end-tailing", "dove-tailing" or "plant-wide seniority" of IBC employees with Metz employees being "end-tailed"?

* * *

F. Witnesses.

All witnesses whom the plaintiffs expect to call to testify, except those who may be called for impeachment purposes only, are:

All Plaintiffs	All Intervenors
Bernard Clausen	Marlin Lessman
Louie Church	Harry Smith
Joe Cashen	Dayton Rasmussen, Jr.

James R. Funkhouser
William C. Metz
Kim B. Murphy
John Mullen
Dave Rome
JoAnne Lueck*
Jan Ohem*
David Brown
William H. Metz
Iola M. Turner
Betty A. Johnson
Dr. Robert Ottemann
Phillip Baker*
Wendall Olsen*
Honorable Richard Robinson

*Known rebuttal witness included at the request of the defendant Metz Baking Company.

All witnesses whom the defendant Bakery, Confectionery and Tobacco Workers Union Local #433 expects to call to testify except those who may be called for impeachment purposes only are:

1. Marlin Lessmann
2. Louie Church
3. Any witness named by any other party.

All witnesses whom the defendant Metz Baking Company expects to call to testify except those who may be called for impeachment purposes only are:

1. Wm. H. Metz
2. Wm. C. Metz
3. Henry Metz
4. Marlin Lessman
5. Roger Smith
6. Jim Funkhouser
7. Dave Brown
8. Doris Ryan
9. Louie Church
10. Bernard Clausen
11. Harry Smith
12. Dayton Rasmussen
13. Sandy Sutton
14. James A. Doyle

15. 79 people from whom affidavits were submitted by Metz in support of Metz' Motion for Summary Judgment
16. All people on Metz seniority list of February-March, 1983
17. Custodians of personnel records for the companies whose records are listed on the exhibit list
18. Custodians of hospital records for the physicians, medical groups, clinics, hospitals or other health care providers whose records are listed on the exhibit list
19. Custodian of records for Social Security
20. Custodian of records for Nebraska Department of Revenue
21. Custodians of records for the other government agencies whose records are listed on the exhibit list
22. All witnesses listed by plaintiffs, Union and Intervenor.
23. Dr. Daniel Miller
24. Dr. R.O. Forsman.

All witnesses whom the defendant intervenors expects to call to testify except those who may be called for impeachment purposes only are:

1. All Interevenors
2. Louie Church
3. Bernard Clausen
4. All plaintiffs' and defendants' witnesses.

G. Expert Witnesses.

Intervenor does not expect to call any expert witness with regard to this matter.

Defendant Union does not expect to call any expert witness with regard to this matter.

Plaintiffs expect to call the following expert witness(es) with regard to this matter:

1) Dr. Robert L. Ottemann.

Defendant Metz expects to call the following expert witness(es) with regard to this matter:

1) Anita Howell
2) Dr. Wayne Newkirk

H. Depositions and Other Discovery Documents.

None of the parties expect to utilize any deposition, answers to interrogatories and request for admissions or portions thereof, except for impeachment purposes or due to unavailability, except as follows:

1) All depositions or portions thereof which are expected to be offered in evidence by plaintiffs as part of plaintiffs' cases in chief are:

a) Deposition of Lewis Huston.

b) Deposition of Dale Burk.

Objections by defendant Union are:

By April 16, 1990

Objections by defendant Metz are:

By April 16, 1990

Objections by defendant Intervenors are:

By April 16, 1990

2) All depositions, answers to interrogatories and requests for admissions or portions thereof which are expected to be offered in evidence by defendant Union as part of the Union's case in chief are:

See list of Metz Baking Co., *infra*.

Objections by plaintiffs are:

By April 16, 1990

Objections by defendant Metz are:

By April 16, 1990

Objections by defendant Intervenors are:

By April 16, 1990

3) All depositions, answers to interrogatories and requests for admissions or portions thereof which are expected to be offered in evidence by defendant Metz as part of Metz' case in chief are:

(a) Metz does not anticipate utilizing any of the depositions unless for impeachment or because the witness is unavailable;

(b) Metz intends to utilize each of plaintiffs' answers to the following interrogatories: 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

Objections by plaintiffs are:

By April 16, 1990

Objections by defendant Union are:

By April 16, 1990

Objections by defendant Intervenors are:

By April 16, 1990

4) All depositions, answers to interrogatories and requests for admissions or portions thereof which are expected to be offered in evidence by defendant Intervenors as part of the Intervenors case in chief are: *None*

Objections by plaintiffs are: *N/A*

Objections by defendant Union are: *N/A*

Objections by defendant Metz are: *N/A*

I. Length of Trial.

Counsel estimate that the trial will consume not less than 20 trial days *no more than 40 and probably about 30 days. This case can be called for nonjury trial on or after May 1, 1990.*

Illegible
U.S. ~~District Court Judge~~
Magistrate

APPROVED:

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Thomas J. Young
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APPENDIX E

(SEAL)
NATIONAL LABOR RELATIONS BOARD
REGION 17
616 Two Gateway Center, Fourth at State
Kansas City, Kansas 66101
Telephone: (913) 236-3863
or 236-3846
March 15, 1984

CERTIFIED – RETURN RECEIPT REQUESTED

D.O. Rasmussen, Attorney
3528 Dodge, Suite 32, Executive Ctr.
Omaha, Nebraska 68131

Re: BAKER'S LOCAL #433
(Metz Baking Company)
Case 17-CB-2865

Dear Mr. Rasmussen:

The above-captioned case charging violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it does not appear that further proceedings on the charge are warranted. The investigation reveals that, in about February, 1983, Metz Baking Company purchased a plant run by Interstate Brands Corporation (IBC) located in Omaha, Nebraska, and subsequently transferred its employees to the IBC plant. Metz allowed its employees to maintain their seniority, while treating former IBC employees as new hires for the purposes of seniority. Both groups of employees were represented by the union, and had

worked under identical contracts. The Union pursued a grievance to arbitration, which was held on April 26, 1983, and, due to the fact that it represented both groups of employees, took a neutral position in the arbitration and presented the arguments in support of both groups for purposes of seniority. As the arbitration occurred more than 6 months prior to the filing of the charge, issuance of a complaint on the Union's conduct at the arbitration is precluded by Section 10(b) of the Act. Further, under all the circumstances, there is insufficient evidence to show that the union failed in its duty to fairly represent the IBC employees at the arbitration.

The evidence reveals that on about July 12, 1983, a former IBC employee requested that the union pursue severance pay from IBC. Although the union initially indicated that it felt severance pay was not proper as employees continued to work for Metz, the Union subsequently pursued a grievance to arbitration, which was held on October 6, 1983, and was successful in obtaining severance pay for former IBC employees. Under these circumstances, including the fact that the Union's answer to the request of July 12, 1983 occurred more than six months prior to the filing of a charge, it cannot be said that the Union failed in its duty to fairly represent employees in this instance.

The investigation reveals that on about December 22, 1983, employees requested that the Union pursue a court determination on an issue as to whether the arbitrator's enforcement of a provision of the contract calling for a setoff of severance pay from employees eligible for early retirement constitutes age discrimination under the Equal Employment Opportunity Act. The Union responded to

this request by inviting employees who wished to pursue such an action to contact the Union to obtain legal assistance in preparing such a complaint. There is no evidence that employees accepted the Union's invitation. It cannot, therefore, be said that the Union failed in its duty to fairly represent employees in this instance.

The investigation also reveals that, on January 5, 1984, employees filed a grievance with the Union over the fact that their seniority with Metz was to be affected by the award of severance pay under the arbitrator's decision. The relief requested was to obtain a definitive answer from the Employer as to status of all affected members. The Union presented the grievance to the Employer and obtained a response from the Employer which satisfied the Union. The Union thereafter declined to further process the grievance. There is insufficient evidence to show that the Union's decision was based on any irrelevant or invidious reasons, but rather it appears the decision was based on the merits of the grievance.

Finally, the investigation reveals that the Employer prepared a proposed receipt to be signed by employees when collecting their severance pay under the arbitrator's decision. the Union objected to the proposed receipt, and subsequently a receipt was prepared which was satisfactory to the Union. The receipt indicates that its purpose is to satisfy claims for severance pay pursuant to the arbitrator's decision. As the Union agreed to the contents and the use of the receipt, it cannot be said that the union allowed the Employer to negotiate directly with employees regarding waiving rights in return for the receipt of severance pay. Under all the circumstances, it was determined that the union did not violate its duty to

fairly represent employees by agreeing to this receipt. Accordingly, I am refusing to issue a complaint in this matter.

See attached copy of Form NLRB-4938 for the procedure applicable for filing an appeal.

Very truly yours,

/s/ Thomas C. Hendrix

Thomas C. Hendrix
Regional Director

TCH/mln
Enclosure
cc: See page three

cc: Harry H. Smith, Attorney
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632-640 Badgerow Building
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Supreme Court, U.S.
FILED
MAY 25 1993
OFFICE OF THE CLERK

No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT METZ BAKING COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NEIL B. DANBERG, JR.
WILLIAM T. OAKES
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STATEMENT OF THE CASE

Respondent Metz Baking Company ("Metz") does not accept Petitioners' Statement of the Case for two reasons. First, the complex procedural history of this case requires a supplementary statement concerning what happened below and why. Second, pursuant to Rule 15.1 of the Rules of the Supreme Court of the United States, there are certain "perceived misstatements of fact or law" in Petitioners' Statement of the Case.

The "rather tortured history of this matter"[1] commenced over ten years ago. The case has now been decided on its facts by Chief Judge Lyle Strom of the United States District Court for the District of Nebraska. His decision has been affirmed in all particulars by the Court of Appeals in a decision on the facts as reflected in the absence of case citations in the opinion.

Procedurally, there have been two arbitrations, two trials and two separate appeals to the Court of Appeals.

A. Supplementary Discussion Of Proceedings Below.

1. Arbitration Proceedings.

This case began in 1983 shortly after Metz Baking Company bought the assets of Interstate Brands Corporation, its failed competitor in the Omaha marketplace. The Interstate Brands Corporation ("IBC") plant was on Nicholas Street in Omaha, Nebraska. It was a newer plant than the Leavenworth Street plant in Omaha operated by Metz. After the purchase, the two work forces were consolidated into the newer plant. The former employees of IBC were end-tailed or placed on the Metz seniority list behind the existing Metz workers. The former IBC employees filed a grievance alleging that their seniority provisions were "unfairly and improperly implemented" by Metz. (App. 116). [All cites in this brief to "App." are to Petitioners' Appendix]

---

[1] As Judge Lyle E. Strom referred to it. (App. 12).

The Arbitrator reviewed the Collective Bargaining Agreement whose terms covered both the Metz and former IBC workers. He determined that there was no provision within the Collective Bargaining Agreement covering merger of two work forces. (App. 118).

The Arbitrator further concluded that end-tailing was appropriate in view of the economic realities surrounding the transfer:

> . . . this is not a case involving the acquisition of a thriving business, but on the contrary, a failing enterprise. Prospects of continued employment [for the IBC workers] were bleak. Integration of Interstate employees on the seniority list by dove-tailing would have resulted in the layoff of approximately three times as many Metz employees as former Interstate employees . . . the hardship imposed on the Metz employees would be severe and disruptive of harmonious labor relations . . . [with respect to the former IBC employees] in the absence of the sale the probability of loss of jobs by attrition and ultimate closing of the plant was imminent.[2] (App. 124). (bracketed material added)

2. The First (Liability) Trial.

After losing the arbitration, Petitioners filed this "hybrid" action in which they sued the Union alleging violation of the Duty of Fair Representation ("DFR") owed to Petitioners and sued Metz alleging breach of the Collective

---

[2] Petitioner suggest in their Brief that "no evidence was adduced" (in the first trial) that "the former IBC facility was a 'failing' enterprise." (Petitioners' Brief, p. 6). This is simply not the case. The arbitration itself was in evidence before the jury as Exhibit 3 and was replete with facts and findings that IBC was a failing enterprise. It is more accurate to say that this fact was known to all, was well-documented in the arbitration (which was in evidence), was not controverted, and needed no further elaboration in the first trial.

Bargaining Agreement in violation of 29 U.S.C. §185 (§301).[3] The trial of this action was bifurcated with an initial trial to the jury on liability and a subsequent bench trial on the remedy. Judge C. Arlen Beam[4] presided over the jury trial, which commenced on July 13, 1985 and concluded three days later on July 16, 1985. The jury returned Special Jury Verdicts in favor of the Petitioners.

Judge Lyle E. Strom, who presided over the second (remedy) trial, summarized the jury findings in the first (liability) trial as follows: (1) The Union breached its duty of fair representation to Petitioners; (2) The Union's failure to negotiate resulted in Petitioners being laid off [unilaterally by Metz] in March of 1983; (3) The Union's conduct tainted the arbitration; (4) Metz assumed and thereafter breached contractual seniority obligations to the Petitioners [again, through treating them as though they had no seniority -- by end-tailing them] and (5) Petitioners were laid off as a result of Metz's said breach.[5]

That is the extent of what the jury decided. The jury was not requested to decide the following issues: (1) How long the Petitioners would have been employed by Metz in view of the diminution in the number of jobs available for bakery workers at the plant; (2) Whether some or all of the Petitioners would nevertheless have been laid off after negotiations; (3) What method of merging seniority between the two seniority lists in the merged work force would have been selected; (4) What would have been the results of negotiations or of a vote on the question of merging seniority lists; and (5) Specifically,

---

[3] There was also a second arbitration before the same arbitrator over the issue of whether Petitioners should receive severance pay for termination from IBC. The same arbitrator heard the second arbitration and awarded severance pay.

[4] Judge C. Arlen Beam has since been appointed and confirmed as a judge on the United States Court of Appeals for the Eighth Circuit.

[5] Paraphrased from Judge Strom's "Conclusions of Law" with bracketed material added. (App. 16).

would negotiations have resulted in end-tailing and laying off the former IBC workers. (App. 87-96).

Thus, the jury did not find which of the competing groups of workers – the IBC or the Metz workers – were entitled to the jobs at the Metz plant, or on what basis.

3. Judgment Notwithstanding The Verdict.

After the jury verdicts, Metz and the Union moved for judgment n.o.v., which Judge Beam granted on August 13, 1986. In his discussion of the duty to negotiate, Judge Beam concluded that the evidence at the first trial failed to establish a "causal connection between a failure to negotiate . . . and any harm that came to the Petitioners." (App. 71). Not only was there no indication the IBC workers could have obtained a Collective Bargaining Agreement which would have favored them, the evidence suggested the Metz workers, who outnumbered the IBC workers 2-1, would have voted down any such proposal:

> Thus, the evidence supports only the conclusion that if the Union had negotiated with Metz and obtained full recognition of IBC seniority for all of the IBC employees (end-tailing the Metz workers) or for some of them (dove-tailing with the Metz workers), the tentative proposal could not have been approved unless the members of the majority Metz group voted against their own economic interests . . .

(App. 72-73).

4. The First Court Of Appeals' Decision (After The Liability Trial).

In *Thomas v. Bakery, Confectionery & Tobacco Workers' Union Local #433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988) (hereinafter *Thomas*), the Court of Appeals reversed Judge Beam's judgment n.o.v. and reinstated the jury verdict. However, the Court of Appeals did not wholly reject Judge Beam's analysis concerning causation, but stated that "this argument goes to the issue of the proper

remedy." (App. 47). The Court of Appeals concluded there was an absence of evidence at the liability trial to determine what would have occurred but for the Union's breach of its duty of fair representation in failing to negotiate. This issue was placed in the remedy trial as directed by Footnote No. 1 of the Court of Appeals decision:

> The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine *what would have occurred but for the Union's failure to negotiate.* Plaintiffs will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely a declaratory judgment and perhaps nominal damages.

(App. 47, n.1) (emphasis supplied).

Therefore, the Court of Appeals directed a determination of what would have occurred with respect to merger of the two groups: this would be central to determining remedies for both the Union's breach of DFR and Metz' breach of contract. Seniority is no guarantor of a job. Here, both groups of workers had seniority, but there was a diminished number of jobs at the plant. The factual question for the second trial was what would have occurred upon consolidation but for the breaches of the Union and Metz.

Even without Footnote No. 1, the trial court at the remedy trial would have been required to determine what would have happened "but for" the acts in question. Since the existing Collective Bargaining Agreement did not answer the question of seniority upon consolidation, determining what probably would have happened is central to Petitioners' ability to establish any entitlement to damages.

This was recognized not only in Footnote No. 1 of the Court of Appeals' majority opinion, but also in the concurring and dissenting opinion by Judge Henley. He wrote that while there might be a violation of the DFR with regard to failure to negotiate, "there is no causal relationship between failure of

the Union to negotiate and any injury to Petitioners." (App. 59). He dissented from a remand of the case for remedy and presaged the result of the remedy trial stating:

> If there is no showing of probable injury, failure to negotiate should not call for reversal and remand for determination of a remedy.

(App. 60).

5. The Second (Remedy) Trial.

After a two-month trial,[6] the District Court concluded that Petitioners had not met their burden of proof to show a casual link between the breaches of the Union and Metz and any harm to Petitioners except for the equivalent of three month's wages. These findings are discussed in the first point in Argument.[7]

6. The Second Opinion Of The Court of Appeals.

Petitioners appealed the District Court's ruling, arguing, *inter alia*, that the issues raised in Footnote No. 1 in the first Court of Appeals decision did not affect all remedies and that the jury had already decided Petitioners were entitled to jobs

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[6] The Metz Workers, whose jobs the former IBC workers sought, were permitted to intervene in the second trial.

[7] The arbitrator and both trial judges reached essentially the same conclusion. The arbitrator found in the first arbitration conducted on April 26, 1983, that the Petitioners were properly end-tailed. (App. 124-25). Judge Beam granted the Defendants' motions for judgment n.o.v. because he concluded, *inter alia*, Petitioners could not establish a nexus between the failure to negotiate and breach of the Collective Bargaining Agreement. (App. 71). The effect of Judge Beam's ruling was to keep intact the arbitration which had approved end-tailing the former IBC workers. In the remedy trial, Judge Strom concluded that Petitioners had not carried their burden to demonstrate they would have obtained the diminished number of jobs upon consolidation of the plant. He further concluded, based upon virtually uncontradicted evidence, that Petitioners would have been end-tailed. (App. 18-22).

based on a "plant-wide" seniority basis. Therefore, a central question for decision before the Court of Appeals on the second appeal was whether Judge Strom had correctly followed and interpreted Footnote No. 1 or whether Petitioners' far more expansive interpretations of the original jury verdicts were correct.

Judge Arnold had written the first decision for the Court of Appeals, and he also wrote the decision for the Court of Appeals on the second appeal. *Thomas v. Bakery Confectionery and Tobacco Workers International Union Local # 433*, 982 F.2d 1215 (8th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3684 (Mar. 26, 1993). In his decision for the Court, Judge Arnold wasted no time in concluding that Judge Strom had properly interpreted the Court of Appeals's own Footnote No. 1:

> Plaintiffs first argue that the District Court erred in its application of Footnote No. 1. They argue that the jury found that had negotiations taken place, the Plaintiffs would never have been laid off, because any new agreement would have preserved their seniority rights. This, they add, is the law of the case, and this Court did not direct the District Court to re-examine the jury's determination as to the probable result of negotiations . . . *Having written this passage, we disagree.* (App. 4). (emphasis supplied).

The Court then explained what it had required of the District Court and why Petitioners' reading of the jury verdicts – a reading which they have repeated in their Petition – was flawed:

> *We expressly directed the District Court to determine "who would have voted to ratify a negotiated solution" so it could ascertain what would have occurred – that is, what the solution would have been – but for the failure to negotiate. Second, the plaintiffs have mischaracterized what the jury decided.* Contrary to the plaintiffs' argument, the jury did not find that an agreement preserving the plaintiffs' jobs would have been reached, but that they would not have been laid off in *March* had the

> Union negotiated. In fact, the jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to decide who would have ended up with jobs after negotiations. (App. 4-5). (emphasis supplied).

The Court of Appeals then proceeded to reject each and every argument raised on appeal by Petitioners. (App. 5-10). From these adverse determinations, Petitioners now seek further review.

B. Perceived Misstatements Of Fact Or Law In Petitioners' Brief.

Metz Baking Company disagrees with certain aspects of the Statement of the Case made by Petitioners as follows:

1. The Collective Bargaining Agreement Did Not Make Provision For Seniority Upon Consolidation Nor Did The Jury Resolve That Issue.

The entire premise of Petitioners' first argument, that their rights under §8(d) of the N.L.R.A. have been violated, is that the Collective Bargaining Agreement provides and the jury found that Petitioners were entitled to plant-wide seniority rights as against the Metz workers, i.e., that upon consolidation of the two work forces, the IBC workers would have had "super-seniority." This premise is completely unsupported since:

(a) The Arbitrator concluded there was no provision in the Agreement governing merger of the two work forces. (App. 118).

(b) "The jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to decide who would have ended up with jobs after negotiations." (App. 5) (App. 87-96).

(c) The trial judge in the first trial concluded the Collective Bargaining Agreement did not provide for integration of work forces. (App. 70).

(d) The first decision of the Court of Appeals both implicitly and explicitly rejected any notion

that Petitioners were entitled to "super-seniority" or that this had been the finding of the jury and directed that the issue be remanded for resolution in the remedy trial. (App. 46-47).

(e) Judge Strom in the remedy trial concluded that there was no provision in the Collective Bargaining Agreement which governed merger of work forces and that the jury had not reached any conclusion on that issue. (App. 12, 16, 18).

(f) The second opinion of the Court of Appeals explicitly rejects Petitioners contention that seniority upon consolidation of work forces was resolved in the jury verdicts. (App. 5).

2. Contrary To Petitioners' Brief, The Court Of Appeals Made No Finding Of "Bad Faith" Upon Which Attorneys' Fees Could Be Based.

A premise of Petitioners' second argument – on attorneys' fees – is likewise unsupported. Petitioners argue in their brief that, " . . . the bad faith exhibited by both Metz and the Union, as reflected in the opinion of the Court of Appeals on the first appeal on this matter justifies an award of attorney fees based upon bad faith." (App. 37).

The difficulty with this argument is that the Court of Appeals has already expressly rejected it, stating it made no such finding:[8]

> . . . With regard to attorneys' fees, the plaintiffs claim that we had already found the Union guilty of bad faith. Therefore, they reason, the District Court was required to award attorneys' fees. *The plaintiffs are straining a bit on this argument. The question of bad faith sufficient to justify an award of attorneys' fees was never before this Court* . . . (App. 8). (emphasis supplied).

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[8] Petitioners' argument is discussed in more detail in the Second Argument, *infra*, p. 24 et seq.

SUMMARY OF ARGUMENT

1. *The Decision of the Court of Appeals is Consonant with Federal Labor Law Principles including Section 8(d) of the National Labor Relations Act.* Petitioners neither litigated the §8(d) argument in the District Court nor in the Court of Appeals, and it should not now be the basis for granting the Petition. In any event, Petitioners as a premise for their §8(d) argument have "mischaracterized"[9] the jury verdicts – which never even determined how to consolidate work forces. Section 8(d) is not applicable because, *inter alia,* under the particular facts of this case, the Collective Bargaining Agreement did not resolve the consolidation problem. In fact, at issue here is almost a pure factual determination by the trial judge in the remedy trial of what would have occurred "but for" the breaches by the Union and Metz. The judge did not renegotiate the Collective Bargaining Agreement, but rather attempted to determine, based on the facts, what would have occurred in the collective bargaining process but for those breaches. A Petition should not be granted to reconsider factual determinations.

2. *Attorneys' Fees were Properly Denied in the District Court.* Petitioners argue that the Court of Appeals found "bad faith" in its first opinion sufficient to justify an award of attorneys' fees. The Court of Appeals in its second opinion rejected this same argument, stating it had made no such finding of "bad faith". Petitioners also argue for the first time in their Petition that attorneys' fees are a compensable element of damages against Respondents. The Court of Appeals could not have addressed this new argument. Generally, the Eighth Circuit follows the American Rule discussed *infra.* Finally, case law does not allow attorneys' fees against the employer unless there is "bad faith," and Judge Strom specifically found no "bad faith" on the part of the Respondents.

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[9] As the Court of Appeals labeled Petitioners' argument – an argument which they have repeated here. (App. 8).

3. *Prejudgment Interest is Discretionary with the Trial Judge.* District courts should be free to set damages which fit the circumstances of each case. Allowing District Courts discretion to award prejudgment interest enhances flexibility and the fashioning of appropriate awards. Where Respondents prevailed through much of the long procedural history of this case, where damages are not liquidated, and where only nominal damages might have been awarded, the District Court did not abuse its discretion in denying prejudgment interest. There appears to be no sound reason to take the N.L.R.B.'s current prejudgment interest rule – a rule which the N.L.R.B. could change in its discretion – and substitute that rule for the discretion and the Federal District Courts.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IS CONSONANT WITH FEDERAL LABOR LAW PRINCIPLES INCLUDING SECTION 8(d) OF THE NATIONAL LABOR RELATIONS ACT

A. This Petition Should Not Be Granted Where The Section 8(d) Issue Was Neither Pled Nor Argued Below.

Petitioners now allege that §8(d) of the N.L.R.A. has been violated because they have been deprived of rights under their Collective Bargaining Agreement and that damages should have been assessed accordingly. Petitioners neither pleaded nor argued §8(d) in the District Court. Before the Court of Appeals, Petitioners neither specifically mentioned nor cited §8(d) of the N.L.R.A. in their Assignments of Error nor in their Brief. The Court of Appeals did not, therefore, have an opportunity to discuss the §8(d) argument now made by Petitioners. Neither was the Court of Appeals able to address any supposed conflict between the actions of the Federal District Court in the remedy trial and decisions from other Courts of Appeal. As a consequence, where the §8(d) issue was not presented to the Court of Appeals, it should not

be presented here for the first time.[10] *See generally, EEOC v. Federal Labor Relations Authority,* 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986).

B. The Petition Should Not Be Granted Where Petitioners' Section 8(d) Argument Rests Upon Erroneous Assumptions.

As discussed more fully in the Statement of the Case, the Collective Bargaining Agreement in this case does not provide for consolidation of work forces or give Petitioners the diminished number of bakery jobs based on "plant-wide" seniority. Yet, Petitioners' §8(d) argument makes those unwarranted assumptions. The Petition should not be granted where it rests upon assumptions which find no support in the proceedings below.[11]

C. The Petition Should Not Be Granted Where Factual Determinations of Causation – Not Controverted Legal Issues – Form the Basis of the District Court's Decision.

1. Factual Determinations By Judge Strom Form The Basis Of The District Court's Decision And This Does Not Violate §8(d).

Judge Strom in his Memorandum Opinion found facts based on the evidence at the remedy trial.[12]

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[10] Neither was Petitioners' second argument (that attorneys' fees are compensable elements of damage,) discussed *infra,* presented to the Court of Appeals.

[11] As discussed *supra* under the Statement of the Case.

[12] Certain of the findings made by Judge Strom illustrate the factual nature of the causation dispute in the remedy trial: 1. "It would have been possible for Metz and the Union to have negotiated a solution to the post-merger seniority problem and posed it to the Union membership for ratification". (App. 18). 2. "If the Collective Bargaining Agreement had been modified, then there could not have been a grievance based on breach

These factual findings do not – as Petitioners argue – conflict with the Collective Bargaining Agreement. Rather, they commence where the Collective Bargaining Agreement stopped. Judge Strom neither rewrote nor renegotiated the Agreement. He did attempt to determine, based on the available evidence, what would have occurred but for the breaches of the Union and Metz. Determination of what would have occurred in the collective bargaining process does not violate §8(d) and is necessary to determine what would "make whole" Petitioners:

> . . . Similarly the make-whole remedy – which could be measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely the parties *would* have agreed to – provides money compensation as a

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of contract . . . " *Id.* 3. "Therefore, [there would have been] no need for arbitration". *Id.* 4. "[A]ny amendments to the seniority provisions of [the Collective Bargaining Agreement] would result effectively in a new agreement and would require submission to the [members] for their approval or ratification." (App. 19). 5. [The By-Laws of Union Local #433 provide]: "Article XI, Section 2, states: 'All basic agreements covering wages, hours, and working conditions will be *subject to the approval of a majority of the members covered in such agreement.*" (*Id.*, emphasis supplied). 6. "Clearly the membership entitled to vote would be the employees of Metz and IBC only as it was their respective contracts which would be modified." *Id.* 7. "[I]t is undisputed that, at the time of the merger of the two work forces in early March, the number of Metz employees eligible to vote significantly outnumbered the number of former IBC employees who could have voted." *Id.* at 19-20. 8. "By stipulation, Metz introduced 79 (seventy-nine) Affidavits from the Metz employees . . . supported by trial testimony in which each stated unequivocally that he or she would have voted to end-tail the former IBC employees." *Id.* at 20. 9. "Had such a proposal been presented for ratification, it is clear that the Collective Bargaining Agreement would have been modified, and the former IBC employees would have been legally end-tailed." *Id.* 10. "In such a situation, arbitration would not have been required, and no breach of contract or of a duty of fair representation could have occurred." *Id.*

> remedy for past wrongs. Combined with the traditional remedy, it imposes no present or future contract obligations . . . This approach is not forbidden by section 8(d) of the Act.

Int'l Union of Electrical, Radio and Machine Workers v. N.L.R.B., 426 F.2d 1243, 1252 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970), *appeal on remand*, 502 F.2d 349 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1974).

2. Causation Determinations are Factual in Nature.

A Petition for Writ of Certiorari would be improvidently granted where, as here, Petitioners simply disagree with the District Court's factual findings on causation. As this Court succinctly stated in *United States v. Johnston*, 268 U.S. 220, 227 (1925); "We do not grant certiorari to review evidence and discuss specific facts." (quoted with approval in *Texas v. Mead*, 465 U.S. 1041, 1043 (1984).

The factor which sets this case apart from the 8(d) cases cited by Petitioners is that the Court of Appeals in its first decision directed that certain causation issues be addressed on remand during the remedy phase of the trial.[13] Although Petitioners now complain that they should not have been required to prove causation in the "damage and remedy" phase of the trial, the handling of causation issues in the remedy trial gave Petitioners a second chance to meet their burden of proof in showing "but for" causation.

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[13] The Union and Metz argued unsuccessfully in their Petition for Writ of Certiorari in 1987 that, *inter alia*, the Court of Appeals should not give Plaintiffs a second chance to prove causation when they had clearly not done so in the liability phase of the trial.

3. Where The Court Of Appeals Has Concurred With The District Court's Findings Of Fact, The Findings Should Not Be Overturned.

The Court of Appeals refused to overturn any of the District Court's findings – which were mainly factual findings – despite what it called the "numerous arguments" made against those findings on appeal. (App. 3).

This Court has been most reluctant to overturn factual findings made by the District Court and affirmed by the Court of Appeals:

> The District Court's finding essentially rests on its determination of factual issues. *United States v. Nixon*, 418 U.S. 683, 702, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Therefore, we will not overturn that finding unless it has no support in the record. *Ibid.* Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred. *Rogers v. Lodge*, 458 U.S. 613, 623, 73 L.Ed.2d 1012, 102 S.Ct. 3272 (1982). We therefore decline to overturn the findings of the District Court in this regard, where, as here, it has been affirmed by the Court of Appeals.

United States v. Doe, 465 U.S. 605, 613-14 (1984).[14]

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[14] Numerous other decisions of this Court establish that same principle: "The Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). This same principle was followed in the earlier case of *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *aff'd in part, rev'd in part on other grounds*, 339 U.S. 605 (1950): "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *See also, Branti v. Finkel*, 445 U.S. 507, 512, n.6 (1980) (declining to review findings of fact claimed to be clearly erroneous, "absent the most exceptional circumstances.")

4. Respondents Should Only Be Held Responsible For Damages Which They Caused.

Any Defendant, including an employer under §301, is liable only for damages which it proximately caused. In *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984), a back pay award to undocumented aliens was reversed. They had suffered retaliation for their Unionizing, but failed to prove their lawful entitlement to be present and employed in the United States during the back-pay period. This Court discussed the "cardinal" assumption that a back pay remedy must be "sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *See also, Richardson v. Communications Workers of America*, 486 F.2d 801, 806 n.7 (8th Cir. 1973) (approving jury instruction that in setting damages for wrongful discharge under §301, jury "should determine the period of time for which Plaintiff would likely have continued in the employ of the Defendant . . . in the absence of the unlawful discharge")[15].

This causation requirement is rooted in the basic policy underlying remedies: "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). Petitioners' suggestion that "causation" is not an integral part of contract damages is without support. As the late Professor Corbin has succinctly observed:

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[15] *Accord, Howard P. Foley Co. v. Int'l Brotherhood of Electrical Workers*, 789 F.2d 1421, 1423 (9th Cir. 1986) ("Generally, the remedy for breach of a collective bargaining agreement is limited to an award of compensatory damages. To be compensatory, there must be a causal relationship between the company's violation of the agreement and the loss claimed by the employee.") [Citations omitted]; *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979) (applying "requirement that compensatory damages be based upon cognizable loss causally traceable to breach"); *M.S.P. Indus., Inc. v. N.L.R.B.*, 568 F.2d 166, 180 (10th Cir. 1977) ("Back pay is awarded only for the period during which the worker would have worked in the absence of discrimination.")

> *It is only when the other party has committed a breach that he can be so charged; and even then the compensatory damages are limited to those losses and pecuniary disappointments that are "caused" by the breach.*

5 Corbin on Contracts, §992 (1964 ed.) (emphasis supplied).

This causation requirement has led a number of courts, both under §301 and other laws regulating the employment relationship, to limit damages because of a factual finding that the worker would have lost his or her job anyway had the act or breach not occurred. For example, the Eighth Circuit Court of Appeals has held in an analogous age discrimination case that entitlement to substantial relief depends on "recreating the circumstances that would have existed but for the illegal discrimination; aggrieved persons are not entitled to recover damages for the period beyond which they would have been terminated for a nondiscriminatory reason." *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982). Similarly, in *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1209-10 (7th Cir. 1989) the court cut off damages at the point after which the employee would have lost his job due to a reduction in force based on legitimate, nondiscriminatory criteria.[16] The specific causation rules stated in these cases

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[16] *See also, Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 159 (6th Cir. 1988) (damages for lost pay limited to period between illegal discharge and time employer would have terminated his position for a nondiscriminatory reason); *Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, (11th Cir. 1986) (damages cut off when Plaintiff's job would have been eliminated due to post-termination company reorganization); *Walker v. Ford Motor Co.*, 684 F.2d 1355, (11th Cir. 1982) (damages limited to duration of training program from which Plaintiff was illegally terminated, but not beyond because of lack of proof that Ford would have employed Plaintiff after training); *Bhaya v. Westinghouse Electric Corp.*, 709 F.Supp. 600, 605 (E.D. Pa. 1989), *aff'd*, 922 F.2d 184 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 2827 (1991) ("If Plaintiffs would have been laid off for permissible reasons sometime after December 1982, then plaintiff's damages should have been limited accordingly. Any subsequent loss of pay simply was not caused by defendant's discrimination.").

mirror the general rule of contract law that substantial damages depend upon demonstration of actual injury proximately caused by the breach. Restatement (Second) of Contracts, §346(2) (1981). "Because a collective bargaining agreement is a contract and enforceable as such, the traditional criteria for the ascertainment of damages where a contract has been breached – foreseeability and proximate cause – are applicable." *Airco Speer Carbon-Graphite v. Local 502*, 479 F.Supp. 246, 256 (W.D. Pa. 1979).

5. In Recreating The Circumstances That Would Have Existed But For The Breach, The District Court Properly Found That The Parties Would Have Agreed To End-Tail The Petitioners.

Judge Strom followed the Court of Appeals' direction in *Thomas* to determine "what would have occurred but for the Union's failure to negotiate." In cases involving the employment relationship, courts often must turn back the clock to recreate what would have occurred but for a breach.[17] Of course, "recreating circumstances," as *Gibson, supra*, suggests, is hypothetical, but so are *any* damage determinations as Professor Corbin aptly noted:

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[17] *EEOC v. Mike Smith Pontiac GMC*, 896 F.2d 524 (11th Cir. 1990) (back pay damages rested on court's determination of what would have happened had complainant been hired and entered the training program); *United Industrial Syndicate, Inc. v. Western Auto Supply Co.*, 686 F.2d 1312 (8th Cir. 1982) (the fundamental measure of contract damages is that which places the non-breaching party in the position it would have been in but for the breach); *Mann v. Weyerhaeuser Co.*, 703 F.2d 272 (8th Cir. 1983) (the object of damages is to put the party in the position he would have been in had the contract not been breached); *Chicago Painters and Decorators Pension, Health and Welfare, and Deferred Savings Plan Trust Funds v. Karr Brothers, Inc.*, 755 F.2d 1285 (7th Cir. 1985) (breach of contract damages should place the aggrieved party in the place he would have been in had the breach not occurred); *Foster v. Univ. of Arkansas*, 938 F.2d 111 (8th Cir. 1991) (absent racial discrimination, the Plaintiff would have been terminated anyway).

> In determining the amount of . . . compensation as the "damages" to be awarded, the aim in view is to put the injured party in as good a position as he would have had if performance had been rendered as promised. It goes without saying that this aim can never be exactly attained. *The position that one would have occupied if history had been different is purely hypothetical. And yet that is the problem that the trial court and jury are required to solve.*

5 Corbin on Contracts, §992 (1964 ed.) (emphasis supplied).

Judge Strom found that whether requested by the Union or by Metz, negotiations would have yielded a proposal to end-tail the IBC workers and the proposal would have carried by a substantial margin of votes of the workers involved. (App. 19-20).

The evidence also supports Judge Strom's finding that the only Union members who would have been allowed, under Union rules, to vote upon ratification of a modification proposal were the Metz and IBC employees. (App. 19). The Union's own interpretations of its By-Laws and Constitution were entitled to deference, and supported Judge Strom's conclusion that both Metz and IBC workers would have voted. (T 2180-81). *Allen v. United Transportation Union*, 964 F.2d 818 (8th Cir. 1992). Judge Strom's reconstruction of the vote is no different from any number of cases in various fields of the law in which damages depended on reconstructing events that did not occur because of a breach. *See Corbin, supra.* The fact that a vote is involved changes nothing.

For example, in *N.L.R.B. v. Aeronautical Indus. Dist. Lodge No. 91*, 934 F.2d 1288 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1161 (1992), a Union official, went through a series of layoffs by both his employer and his Union, and was the victim of a number of unfair labor practices by his Union. 934 F.2d at 1290-92. The Second Circuit upheld a full back pay award and found sufficient evidence before the Board making it reasonable to find that he would have been reelected in 1986 even though he was not, in fact, a candidate then. *Id.* at 1296-97. Even the fact that he actually ran and lost in 1990

was irrelevant since he had not had the opportunity to establish his incumbency history. *Id.* at 1298. The court held that the evidence before the Board was sufficient to infer successful reelection campaigns in 1986 and 1990. *Id.* at 1297-98.[18]

6. A Negotiated Agreement To End-Tail The Petitioners Would Have Complied With The Union's Duties To All Affected Members.

The record in this case fully supports Judge Strom's findings that the Union would have acted within the bounds of its duty of good faith and fair representation in approving a proposal to end-tail the Petitioners. As he observed: "Negotiating seniority provisions is a duty uniquely within the province of the bargaining agent. The Union is free to renegotiate seniority provisions [subject only] to its obligation to treat all members fairly." (App. 18). *See generally, Air Line Pilots Ass'n Int'l v. O'Neill,* 111 S.Ct. 1127 (1991).

Seniority is a contract right existing solely by reason of the Collective Bargaining Agreement, not by reason of statute, and in negotiating with an employer a Union has both the power to create seniority for its members and the power to modify or destroy those rights in the interest of all of its members. *Elder v. New York Cent. R. Co.,* 152 F.2d 361, 365

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[18] *See also, Curry v. Baker,* 802 F.2d 1302 (11th Cir. 1986), which involved the results of a runoff election between two candidates for the Democratic nomination for the Governor of Alabama. One candidate illegally encouraged 14,000 voters who had voted Republican in the primary to vote in the runoff. *Id.* at 1306. This same candidate then won by 9,000 votes. *Id.* at 1305. On appeal, the Eleventh Circuit Court of Appeals held that the party contesting the election met its burden under Alabama law to show that the winning party did not receive the required number of votes. *Id.* at 1313-14.

Curry is significant here because it is additional authority that a reconstructed vote can be the basis for determining rights. The evidence in the present case of how the vote would have turned out, including Affidavits of the majority of potential voters, is much more substantial than the evidence relied upon in *Curry*. Moreover, it was Petitioners who unsuccessfully bore the burden of proof.

(6th Cir. 1945). The incidents of seniority can be freely altered or amended by modification of the Collective Bargaining Agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).[19]

Such an agreement under the circumstances of this case would have been well supported by objective justifications. (*See generally*, the first arbitration (App. 113-128) and its findings concerning the economic realities favoring the Metz workers.) The Metz workers had helped put Metz Baking Company in position to buy out its competitor and use the acquired plant to make goods under Metz' brands rather than under IBC's.[20] The Metz workers were the "surviving group."

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[19] A number of cases have held that a Union did not breach its duty of fair representation by its negotiation of end-tailed seniority agreements. *See e.g., Bruen v. Local 492 Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO*, 313 F. Supp. 387 (D.N.J. 1969), *aff'd* 425 F.2d 190 (3rd Cir. 1970); *Brown v. Truck Drivers and Helpers Local Union No. 355*, 292 F. Supp. 125 (D.Md. 1968), *aff'd* 416 F.2d 1333 (4th Cir. 1969). In addition, in cases arising under §301, courts have determined that Unions did not breach their DFR by their manner of handling grievances of employees who had been end-tailed following a merger, acquisition or change of operations by an employer. *Keeley v. Refiners Transp. and Terminal Corp.*, 60 Lab. Cas. ¶10,214, (E.D. Mich. 1969); *Brady v. Consolidated Freightways Corp.*, 82 LRRM 2245, 70 Lab. Cas. ¶13,417 (S.D. Ohio 1972); *Hardin v. Strickland Transp. Co.*, 404 F. Supp. 585 (E.D. Mo. 1975); *Bernard v. McLean Trucking Co.*, 429 F. Supp. 284 (D. Kan. 1977); *Turley v. Hall's Motor Transit Co.*, 296 F. Supp. 1183 (M.D. Penn. 1969). There are numerous additional cases which support end-tailing upon the merger or consolidation of companies and hold that, in acquiescing, the Union does not violate §301. *See generally*, Annotation, *Union's Duty of Fair Representation in Merging Seniority Lists*, 42 A.L.R. Fed. 69 at §§13-17 (1974).

[20] Similarly, the court in *Baker v. Newspaper & Graphic Communications Union, Local 6*, 461 F. Supp. 109 (D.D.C. 1978), *aff'd in part, vacated in part on other grounds*, 628 F.2d 156 (D.C. Cir. 1980), granted summary judgment against an employee group complaining about a new agreement changing their existing seniority rights. The court found that there were "well-known, objective reasons for the Union's acceptance of the agreement, and the absence of any evidence of discrimination . . . ." *Id.*

The Petitioners had been part of a failing business and likely would have lost their jobs in the near future in any event.[21]

If there had been a change in the Collective Bargaining Agreement, there would have been no arbitration, and, therefore no damage associated with the Union's breach of its DFR concerning the original arbitration.[22]

---

at 113. The contract was not arbitrary or discriminatory. "Rather it represented a freely arrived at compromise reflecting both the legal and moral duties of the parties and the economic realities confronting them." *Id.* at 116.

[21] A majority's vote to favor itself was upheld in *Britt v. Trailmobile Co.*, 179 F.2d 569 (6th Cir.), *cert. denied*, 340 U.S. 820 (1950). After Trailmobile absorbed a company called Highland and assumed all of its obligations, Trailmobile employees, who had been represented by a different Union and who outnumbered the Highland employees by 10 to 1, voted to join the Union representing Highland employees and to approve a new contract that end-tailed the Highland workers behind the Trailmobile workers in the merged labor group. The court found no discrimination and approved the arrangement. *Id.* at 572-73.

[22] The testimony of Union President Church at the second trial indicated that once a Collective Bargaining Agreement has been altered, it is binding upon the membership. (T:2197-98). The uncontroverted evidence, as demonstrated *supra*, is that alteration in the seniority provisions of the Collective Bargaining Agreement would have favored the Metz workers. (T:2253). Church testified no grievance would have been processed with respect to any change in the Collective Bargaining Agreement since that would not be a proper subject of arbitration. (T:2197). Thus, as Judge Strom found, a change in the Collective Bargaining Agreement would have been in lieu of an arbitration on the seniority issues. (App. 20).

Even if another arbitration had been conducted, the evidence at the remedy trial demonstrated that the Collective Bargaining Agreement would have been altered to end-tail the Petitioners. (T:2253). Since an arbitration draws its essence from the Collective Bargaining Agreement, the arbitrator could not have varied that result. *See generally, United Steel Workers Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

II.

ATTORNEYS' FEES WERE PROPERLY DENIED BY THE DISTRICT COURT

Petitioners' argument that attorneys' fees are properly an element of compensatory damages was not raised before the Court of Appeals. Instead, Petitioners argued that the District Court had improperly denied attorneys' fees because there was "bad faith" on the part of both the Union and Metz. As the Court of Appeals described Petitioners' argument concerning attorneys' fees: "With regard to attorneys' fees, the Petitioners' claim we had already found the Union guilty of bad faith. Therefore, they reason, the District Court was required to award attorneys' fees." (App. 8). The Court of Appeals rejected this argument by simply noting the issue of "bad faith" sufficient to justify an award of attorneys' fees "was never before this Court." (App. 8). In addition, Judge Strom had specifically concluded: "There is no evidence of such [bad faith] conduct by defendants in the instant case." (App. 29). Finally, the Court of Appeals wrote that even if there had been a finding of bad faith, attorneys' fees were still discretionary. (App. 8).

Petitioners may not now raise a justification for attorneys' fees which was not assigned as error or litigated in the Court of Appeals. When issues are not argued below, the Court of Appeals has no opportunity to consider the merits of such an argument and this Court is without the benefit of the Court of Appeals' analysis and conclusions on the issue. The Supreme Court will not ordinarily consider an issue which was neither raised before nor considered by the Court of Appeals. *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 147, n.2 (1970). The Supreme Court declined to consider issues which were not presented to the Court of Appeals in *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986):

> Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals. Under these circumstances, several central issues on which resolution of the question presented

> may well turn cannot be reached or resolved. Accordingly, we dismiss the writ of certiorari as improvidently granted. (Citations omitted).

Even assuming *arguendo* that Petitioners may raise this new argument,[23] the Courts of Appeals which permit attorneys' fees as a compensable element of damages have not held the employer liable for attorneys' fees on this theory.[24]

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) this Court held that in conformity with the "American Rule", and in the absence of specific statutory

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[23] This Court has earlier rejected a Writ of Certiorari on this same issue in a case where it was actually litigated below: *Scott v. Teamsters Local Union 377*, 548 F.2d 1244 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977).

[24] *Stanton v. Delta Air Lines, Inc.*, 669 F.2d 833 (1st Cir. 1982) (damages assessed against union included plaintiff's legal costs incurred in processing grievance against employer); *Ames v. Westinghouse Elec. Corp.*, 864 F.2d 289 (3rd Cir. 1988) (employee was not entitled to recover attorneys' fees against employer under §301 – however, employee was entitled to consequential damages from the union, equal to the amount incurred in bringing claim against employer); *Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61*, 620 F.2d 439 (4th Cir. 1980) (court found union liable to employee for expenses incurred in employee's grievance against employer; case remanded to the district court to determine a reasonable amount of attorneys' fees and costs); *Seymour v. Olin Corp.*, 666 F.2d 202 (5th Cir. 1982) (union liable for employee's attorneys' fees); *Scott v. Local Union 377*, 548 F.2d 1244 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977) (element of compensatory damages in employee's §301 suit against union includes attorney fees incurred in employee's suit against employer); *Bagsby v. Lewis Bros., Inc.*, 820 F.2d 799 (6th Cir. 1987) (*Alyeska* case precluded award of attorneys' fees against employer – however, attorneys' fees could properly be assessed against union pursuant to *Scott, supra*); *Zuniga v. United Can Co.*, 812 F.2d 443 (9th Cir. 1987) (in employee's action against union, one of the elements of damages is amount employee spent on attorneys' fees in case against employer). *But see Bennett v. Local Union No. 66*, 958 F.2d 1429 (7th Cir. 1992) (where union and employer participated in each other's breach of duty, union and employer were jointly and severally liable for back pay and attorneys' fees).

authority or other express authorization, or bad faith, each litigant must bear the expenses of its own attorney.

The United States Court of Appeals for the Eighth Circuit has followed this Court's decision in *Alyeska* in concluding that attorneys' fees cannot be levied against the employer where, as here, there is no "bad faith":

> Attorneys' fees are ordinarily not recoverable by the prevailing party in federal litigation absent either statutory authorization or circumstances in which the losing party has acted in bad faith.

General Drivers, Helpers and Truck Terminal Employees, Local No. 120 v. Sears, Roebuck & Co., 535 F.2d 1072, 1076 (8th Cir. 1976).

But whatever the pre-existing law in the Court of Appeals has been, the issue of attorneys' fees as a compensable element of damages was not presented to the Court of Appeals in this case and we do not know but can only speculate how the Court of Appeals would have resolved that precise issue. In the absence of a decision on this issue below, the issue should not be decided in this case now. *Id.* at 247.

III.

PREJUDGMENT INTEREST IS DISCRETIONARY WITH THE TRIAL JUDGE

In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court stated that in hybrid §301 actions such as this great discretion should be given to the lower court in fashioning remedies:

> The appropriate remedy for a breach of a Union's duty of fair representation must vary with the circumstances of the particular breach . . .
>
> In such situations, the Court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief . . .

Id. at 195-96.

No prejudgment interest was awarded by the trial judge at the remedy trial. (App. 32). The Court of Appeals affirmed,

concluding in pertinent part that: "An award of prejudgment interest is within the discretion of the trial judge; it is never automatic. We see no evidence here that the District Court abused his discretion." (App. 8).

Prejudgment interest is discretionary with the trial court. *See also, Wolf v. Frank,* 477 F.2d 467, 479 (5th Cir.), *cert. denied,* 414 U.S. 975 (1973).[25] "The award of prejudgment interest in an action under §301 of the Labor Management Relations Act, 29 U.S.C. §185, is within the discretion of the trial judge." *Chrysler Motors v. Int'l Union,* 959 F.2d 685, 689 (7th Cir.), *cert. denied,* 113 S.Ct. 304 (1992).

It is up to the trial court to determine whether prejudgment interest is necessary for fair compensation, or whether it is unfair to Respondents to add interest to an award which could not reasonably or certainly be calculated at an earlier stage of the proceedings. In the present case, for example, the Respondents prevailed during much of the case's chronology, as is evident from the Statement of the Case. The very existence of an award in excess of nominal damages was in doubt based upon Petitioners' lack of causal evidence in the remedy trial as is evidenced by the varying amounts of judgments awarded by the trial judge to each of the 40 individual and unique Petitioners' cases. *See e.g., Laday v. Chicago M. St. P.& P.R. Co.,* 422 F.2d 1168 (7th Cir. 1970).

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[25] A district court's exercise of discretion in refusing to grant prejudgment interest has often been upheld in federal employment and labor cases. *MacDissi v. Valmont Industries, Inc.,* 856 F.2d 1054, 1061 (8th Cir. 1988) (prejudgment interest denial discretionary with trial court); *see also, Blim v. Western Electric Co.,* 731 F.2d 1473, 1479-80 (10th Cir.), *cert. denied,* 469 U.S. 874 (1984) (prejudgment interest not granted); *Rose v. National Cash Register Corp.,* 703 F.2d 225, 230 (6th Cir.), *cert. denied,* 464 U.S. 939 (1983) (prejudgment interest not proper); *Kolb v. Goldring, Inc.,* 694 F.2d 869, 875 (1st Cir. 1982) (prejudgment interest not awarded); and *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1114 (4th Cir.), *cert. denied,* 454 U.S. 860 (1981), *on remand,* 548 F.Supp. 104 (W.D.N.C. 1982), *aff'd in part, rev'd in part,* 717 F.2d 114 (4th Cir. 1983) (award of prejudgment interest not granted).

Prejudgment interest is not imposed as a matter of right. *See Board of Commissioners v. United States*, 308 U.S. 343, 352 (1939) (interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness; it is denied when its exaction would be inequitable); *Blau v. Lehman*, 368 U.S. 403, 414 (1962). In *Oil, Chemical & Atomic Workers Int'l Union Local No. 4-447 v. American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977), the Court, in a §301 case, held that prejudgment interest is purely discretionary and failure to award prejudgment interest is well within the discretion of the District Court. *Id.* at 1144.

Petitioners argue that the ability of the District Courts to fashion awards within their own discretion, as permitted by *Vaca v. Sipes, supra*, should be circumscribed. They argue instead, for a rule that would bring the federal courts into lockstep with the National Labor Relations Board in order that there should be a "consistent" federal labor policy. Yet, when this Court in *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953) permitted the N.L.R.B. to devise its own remedies, there was no accompanying rule or rationale that the N.L.R.B. would set policies for the Federal District Courts.

In *Lodges 743 and 1746 v. United Aircraft Corp.*, 534 F.2d 422 (2nd Cir. 1975), *cert. denied*, 429 U.S. 825 (1976), *appeal on remand*, 604 F.2d 4 (2d Cir. 1979), the United States Court of Appeals for the Second Circuit concluded that it would be fundamentally unfair and inequitable to allow prejudgment interest to the prevailing Plaintiff prior to the time when a judicial body determined the liability and damages due from the Defendant, where the damage award was unliquidated and not readily ascertainable and certain. That Court denied a request made therein that it should adopt the prejudgment interest rules and standards set by the N.L.R.B. as follows:

> We, of course, agree that the decision whether to award prejudgment interest is governed by federal law . . . But from this premise does not flow the conclusion that remedies adopted by the N.L.R.B.

> are to be mechanically adopted by the courts in section 301 actions. *Whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts. There seems no sound reason why we should not take the same approach in suits under section 301 rather than rigidly adopt the identical remedies employed by the N.L.R.B. on actions involving unfair labor practices.*

534 F.2d at 446. (emphasis supplied).

Where, as here, damages are unliquidated, and where the chronology of the case demonstrates no dilatory or bad faith conduct, but, instead, substantial periods where Respondents prevailed, prejudgment interest need not and should not be awarded.

CONCLUSION

For the foregoing reasons, Petitioners have not met their burden of demonstrating that this Writ of Certiorari should be granted. In fact, this case involved factual decisions of essentially uncontroverted issues in a case where the Collective Bargaining Agreement did not answer the factual question of which group of workers would have obtained jobs in the consolidation of two work forces. The decision of the Court of Appeals should be affirmed, and the Writ of Certiorari should be denied. In addition, for all of the foregoing reasons, Petitioners' request for summary disposition in their favor is without merit and should be denied.

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Supreme Court, U.S.
FILED
JUN 4 1993
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No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondents, from and after the Eighth Circuit's remand of this matter in 1987, have chosen to commingle Petitioners' claim for damages arising from the Union's failure to negotiate with the Petitioners' hybrid §301 claim. By so doing the Respondents have argued and the District Court and Eighth Circuit have accepted that the Petitioners' damage claims under their §301 action are measured by the "but for" rule and not pursuant to the existing collective bargaining agreement.

The Jury's Special Verdict dealt separately with both causes of action and specifically found, with regard to Petitioners' §301 claim, that Petitioners were wrongfully terminated by reason of Metz' breach of the collective bargaining agreement.

The Respondents suggest that simply because the jury found that the Petitioners were wrongfully terminated from their employment by reason of Metz' breach of the collective bargaining agreement that this did not resolve the issue of who would have ended up with the available jobs after negotiations. Initially, Petitioners point out that there were never any such negotiations. Second, the contract, as written, preserved Petitioners' jobs by reason of plantwide seniority. The Respondents defended the damage and remedy claims of the Petitioners by claiming that post-breach of contract hypothetical negotiations and a hypothetical ratification vote was a permissible basis upon which to determine that Plaintiffs' damages and remedies could be limited under their §301 claim. This is one of the issues presented by the Petitioners.

The Respondent Metz has, throughout the course of this litigation, referred to Interstate Brands Corporation's Omaha plant as a "failing company". No evidence has ever been adduced to support this claim and Metz' repeated restatement of this phrase does not make it so.

PRELIMINARY MATTER

In their Petition for Writ of Certiorari the Petitioners cited, at page 17, *Lewis v. Tuscan Dairy Farms, Inc., et al.*, 752 F.Supp. 116 (S.D.N.Y. 1990). This case was reversed on November 19, 1992 by the Second Circuit in *Alier v. Tuscan Dairy Farms, Inc.*, 976 F.2nd 946 (2nd Cir. 1992). The Second Circuit's Opinion, citing *Air Line Pilots Association International v. O'Neill*, 111 S.Ct. 1127, 136 LLRM 2721 (1991) remanded this action to the District Court to consider whether the Union had breached its duty of fair representation when considered in light of the "wide range of reasonableness" allowed to a Union, as set forth in *Air Line Pilots*.

ARGUMENT

I.

POST-BREACH OF CONTRACT HYPOTHETICAL ACTION CANNOT LIMIT A PLAINTIFFS' DAMAGE AND REMEDY CLAIMS.

The Respondents have cited numerous cases where a plaintiffs' damages have been established by a Court attempting to determine what would have occurred had a

company or a union not breached the collective bargaining agreement or a duty to fairly represent a plaintiff. These cases include *Int'l Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 426 F.2d 1243, 1252 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970), *appeal on remand*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 921 (1974), *N.L.R.B. v. Aeronautical Industrial District Lodge No. 91*, 934 F.2d 1288 (2nd Cir. 1991) and *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982) and others. The rationale of these cases is not supportive of the position of the Respondents. The underlying premise which allows a Court to attempt to determine what would have occurred but for the wrongful conduct of a Defendant is that the wrongdoer cannot benefit from its own wrongdoing. This is nothing more than an adaptation to the area of labor relations of the principle announced by this Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 90 L.Ed. 650 (1945), wherein this Court stated as follows:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. (Citations omitted). *Supra* at 265.

The actual argument of the Respondents, accepted by the District Court and the Eighth Circuit, is that the Respondents, having breached the collective bargaining agreement and the Union having breached its duty to fairly represent the Petitioners, can benefit by reason of that breach by arguing that had they not so breached the collective bargaining agreement, they could have negotiated an agreement which would have stripped the Petitioners of their established seniority rights. Distilled to its

most elemental terms, the legal argument presented and adopted by the lower courts in this action is that the "wrongdoers can benefit from their own wrongdoing".

If it were not enough that this legal principle has been turned on its head by the District Court and the Eighth Circuit, both of these Courts placed the burden upon the Plaintiffs to prove that hypothetical negotiations resulting in a hypothetical collective bargaining agreement hypothetically stripping Plaintiffs of their established seniority rights would not have been ratified by the appropriate Union membership.

The speculation engaged in by the District Court and the Eighth Circuit is simply not allowed in order to limit Petitioners' damage and remedy claims. To comprehend the extent of the speculation engaged in by the Lower Courts, Petitioners have appended to this Reply Brief as Appendix "N" one of the 79 identical affidavits submitted by the Respondents to the District Court and which the District Court and the Eighth Circuit found to be *competent* evidence.

In the purchase agreement between Metz and IBC, Metz agreed to assume IBC's duties under the IBC-Leavenworth Street labor contract which required that Metz was obligated to recognize the seniority of the Petitioners. The relevant provisions of this purchase agreement are set forth in the Eighth Circuit's first Opinion with regard to this matter (App. 40-42). The Special Verdict of the Jury specifically found that Metz was bound by this collective bargaining agreement and breached the agreement (App. 98-100). The By-Laws of the Union, in evidence at the trial of the remedy/damage portion of

this action, specifically provided that any modification of a collective bargaining agreement required an actual vote of the membership. This provision, Article XI., Section 2., is set forth in the Trial Court's Memorandum Opinion (App. 19). Metz independently agreed in its purchase agreement with IBC to honor Petitioners' seniority and it breached not only the purchase agreement but also the collective bargaining agreement when it failed to honor Petitioners' seniority. There having been no modification of the collective bargaining agreement, the speculation advanced by the Respondents and adopted by the Trial Court and the Eighth Circuit has allowed the Respondents to evade the obligations which they owe to the Petitioners under the Metz-IBC purchase agreement, the collective bargaining agreement and the By-Laws of the Respondent Union.

II.

PETITIONERS PRESERVED THE ISSUE OF ATTORNEY FEES.

The Respondents suggest that Petitioners did not properly preserve the issue of the failure of the District Court to award attorney fees. Respondents have pointed out that Petitioners did not argue to the Eighth Circuit that attorney fees should be awarded as a part of their compensatory damage claim. While this is true, the Petitioners did raise the issue of the failure of the Trial Court to award attorney fees. This is the issue before this Court. Attorney fees could only have been awarded either as part of compensatory damages or under the "bad faith" exception of the American rule. The identical argument

made to this Court was not made to the Eighth Circuit because the Eighth Circuit had long ago determined that attorney fees, in hybrid §301 actions, were not properly a part of a Plaintiffs' compensatory damage claim. *Cronin v. Sears Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978) and *Richardson v. Communication Workers of America*, 530 F.2d 126, 132 (8th Cir. 1976).

The issue raised in the Eighth Circuit was as follows:

V.

WHETHER THE DISTRICT COURT ERRED IN FAILING TO AWARD PLAINTIFFS ATTORNEY FEES.

Additionally, Petitioners further raised in the Eighth Circuit the following issue:

X.

WHETHER THE DISTRICT COURT ERRED IN ITS METHOD OF COMPUTATION OF DAMAGES AND THE REMEDY DUE PLAINTIFFS.

There is no requirement that the identical argument made before a lower court be presented to this Court. The cases cited by the Respondents, *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 147 n.2, 90 S.Ct. 1598, 1602 n.2, 26 L.Ed.2d 142, 138 n.2 (1970) and *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) only relate to "issues" presented, not the argument made.

If, in fact, "exceptional circumstances" are required to be shown in order for this issue to again be raised in this Court then Petitioners suggest that the Eighth Circuit's long-standing rule against allowing attorney fees as part of compensatory damages in hybrid §301 actions is a sufficient "exceptional circumstance" which would allow

this Court to consider this issue if, in fact, Petitioners have not adequately preserved this issue by the nature of the arguments submitted to the Eight Circuit.

III.

THE ARGUMENTS AND ISSUES RAISED BY THE INTERVENORS ARE IRRELEVANT

The Intervenors have argued that the severance pay arbitration bars the Petitioners' claims herein. The Intervenors' position was rejected by the Trial Court. While Metz and the Union also raised these identical issues, only the Intervenors Cross-Appealed to the Eighth Circuit with regard to these issues. The Eighth Circuit never addressed these issues as raised by the Intervenors and they are not relevant with regard to Petitioners' Petition for a Writ of Certiorari since, at most, this would require a remand to the Eighth Circuit to consider these issues, if required.

The Eighth Circuit would never be required to consider these issues since the severance pay issues could only be raised by either Metz or the Union and the Intervenors had no standing to raise or assert issues on behalf of another party unless that party was unable to assert its own rights, a condition which is nonexistent with regard to this action. See *U.S. v. Metropolitan St. Louis Sewer District*, 952 F.2d 1040, 1043 (8th Cir. 1992).

CONCLUSION

The issues presented by the Petitioners' Petition for Writ of Certiorari to the Eighth Circuit are fully presented to this Court by reason of the nature of the submissions of all parties to this action. The issues presented by the Petitioners are essentially legal issues. While the issue presented with regard to the failure of the Trial Court to award interest is normally fact intensive, the failure of the Trial Court to enunciate any basis justifying the denial of interest presents the legal issue as to whether or not the Trial Court is required to so do in order to deny the award of interest.

The Petitioners renew their request that this Court order a summary disposition of this matter on the merits and direct the Eighth Circuit to remand this matter to the Trial Court with specific instructions that Petitioners' remedy and damage claims be measured by the collective bargaining agreement in existence; that attorney fees be awarded as part of Petitioners' compensatory damage claim; and, that interest be awarded absent any adequate justification for its denial.

Respectfully submitted,

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No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX OF PETITIONERS

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N. Affidavit of William T. Adams.....App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al.,	)	CIVIL NO. 83-0-652
Plaintiffs,	)	AFFIDAVIT OF WILLIAM T. ADAMS
vs.	)	
BAKERY, CONFECTIONERY AND TOBACCO WORKERS, UNION LOCAL #433, et al.,	)	
Defendants.	)	

STATE OF NEBRASKA)
)
COUNTY OF DOUGLAS)

COMES NOW the Affiant, William T. Adams, and for his Affidavit in this matter, states under oath as follows:

1. That he was a full-time or part-time worker for Metz Baking Company ("Metz") in Omaha, Nebraska, in February and March of 1983;

2. That he was at that time a member of Union Local No. 433 of the Bakery, Confectionery and Tobacco Workers (the "Union") and he was covered by the Collective Bargaining Agreement between Metz and the Union;

3. That immediately prior to the time Metz acquired the assets of IBC in Omaha, Nebraska in February, 1983 he was working for Metz in Omaha, Nebraska and he was not employed at that time by Interstate Brands Corporation (IBC);

4. That he would have been eligible to vote in February or March of 1983 on the subject of combining the work forces of Metz and the former IBC workers in Omaha, Nebraska.

5. That he is aware that at the time IBC was acquired, the former IBC workers became "new hires" of Metz, and they were "end-tailed" or placed at the bottom of the seniority list with respect to the existing Metz work force in Omaha, Nebraska. He further states that if he had been given an opportunity to vote on the subject at that time he would have been present at any such vote and he would have voted to end-tail the former IBC workers just as Metz in fact did. He further specifically states that he would have voted against dove-tailing or any other method of combining the two work forces other than end-tailing;

6. That he further states at the time this occurred he was aware of the attitude and belief of the Metz workers in Omaha, Nebraska, and based upon his contacts with them it is his opinion that the Metz workers believed end-tailing the former IBC workers was the only proper solution and the Metz workers would have voted as a group in favor of end-tailing the former IBC workers.

FURTHER AFFIANT SAYETH NAUGHT.

DATED THIS 12 day of October, 1989.

/s/ William T. Adams
William T. Adams

SUBSCRIBED AND SWORN to before me this 12 day of October, 1989.

/s/ Kathleen E. Muldoon
Notary Public

GENERAL NOTARY – State of Nebraska
KATHLEEN E. MULDOON
My Comm. Exp. Jan. 30, 1992

Supreme Court, U.S.
FILED
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No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONARY & TOBACCO WORKERS UNION, LOCAL #443 and CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL BRIEF

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REASON FOR INTERVENORS' REPLY BRIEF

Supreme Court Rule 15 provides that any party may file a supplemental brief at any time while a petition for certiorari is pending calling attention to an intervening matter not known at the time of the party's last filing. The Petitioners in their Reply Brief at Section III on page seven state that the Intervenors are without standing in the case. The Petitioners have raised an issue that was not part of their **"Questions Presented for Review"** in their Petition for Writ of Certiorari. The Petitioners thus raise a new issue not appealed after the Intervenors' Brief. The new matter raised should entitle the Intervenors to a response because the issue raised in the Petitioners' Reply Brief is a new issue.

ARGUMENT

I

THE PETITIONERS CANNOT RAISE A NEW QUESTION NOT PRESENTED IN THEIR PETITION FOR A WRIT OF CERTIORARI.

Supreme Court Rule 14.1(a) states as follows:

"The petition for writ of certiorari shall contain, in the order here indicated:

> *(a) "The questions presented for review, expressed in the terms and circumstances of the case, but without necessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on the page. The statement of any question presented will be deemed to comprise every subsidiary question fairly presented therein. Only questions set forth in the petition, or fairly included*

> *therein, will be considered by the Court.*" (underlining added)

The Petitioners presented no issue or challenge to the standing of the Intervenors to intervene in the case at the Supreme Court level since no issue presented dealt with standing even remotely. The Intervenors standing to intervene thus cannot be considered by the Supreme Court. The failure to appeal the standing issue implies that the finding that the Intervenors had standing to intervene is final and binding.

It is unfair to allow the Petitioners to amend their appeal in an untimely manner for an issue which was not timely appealed pursuant to Supreme Court Rule 13.

It is even more unfair to allow the Petitioners to lay in waiting until the Intervenors have filed their brief based upon a response to the three questions presented and then bring up the standing issue which was not raised until after the time for petitioning on the standing issue has passed. The Petitioners should be foisted on their own petard. The standing issue should not be reviewed.

II

RAISING THE EFFECT OF THE SEVERANCE PAY ARBITRATION (DOYLE II) IS NECESSARY AND PROPER ON THE PART OF THE INTERVENORS AS A DEFENSE TO THE PETITIONERS' ALLEGATIONS ON APPEAL THAT THE DAMAGE REMEDY IS IMPROPER.

The Petitioners now take the position that even if the remedy granted by the Eighth Circuit is proper for a

failure to negotiate case, it is not proper for a breach of contract case since the collective bargaining agreement was never modified. Should the Petitioners prevail on that issue then the only defense is that under that very same collective bargaining agreement, the receipt of severance pay is sufficient to bar reinstatement and/or damages. That is the very position espoused by the Intervenors since their intervention. No other party presented or argued that position. That is probably why the Petitioners have now attacked the standing of the Intervenors on appeal. For if the Intervenors have no standing, then no other party can raise or has raised the effect of the severance pay arbitration (Doyle II).

Basically the Intervenors say that if you want to enforce the collective bargaining agreement, then enforce all of it including the parts covering the effect of receipt of severance pay. That is the argument made in the Intervenors' initial brief.

That argument is both material and relevant to the determination as to the proper enforcement of the collective bargaining agreement.

One need not remand the case to the Eighth Circuit, for if one finds that the Petitioners lost all rights to jobs, seniority, recall rights, or damages based upon the loss of same by accepting the Doyle II award and the monies therefrom, then the decision of the Circuit Court should be sustained. The defense of the effect of the severance pay arbitration can resolve all arguments with regard to the enforcement of the collective bargaining agreement, thus barring the Petitioners' rights to jobs and damages, and, if that is the case, providing another ground for

upholding the decision of the Eighth Circuit and denying the prayer of the Petitioners. The Petitioners must again be foisted on their own petard. If they make their bed, then they must lie down on it. The Petitioners arbitrated severance pay issues in Doyle II. Doyle II was reviewed by Judge Robinson and found to be sound. The Petitioners received their money. They thus have no jobs or damages due.

III

THE INTERVENORS SHOULD NEVER BE BOUND BY ANY PURPORTED AGREEMENT NOT TO RAISE THE EFFECT OF THE SEVERANCE PAY ARBITRATION (DOYLE II) BETWEEN THE UNION, THE COMPANY, AND/OR THE PETITIONERS.

For the reasons stated at Page 9 of the Intervenors' Brief, the Intervenors are not bound to any Stipulation in Civil No. 83-0-560 which allegedly agreed to waive the effect of the receipt on future damage issues. The cases cited therein are incorporated by reference herein.

Further, even if the Stipulation is binding on the parties, other than the Intervenors, in a recent case, the failure to seek a democratic vote of the Union members as required by the Union By-Laws and Constitution voids any side-agreements. See *Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated*, 945 F.2d 889, 60 U.S.L.W. 2243, 138 L.R.R.M. (BNA) 2433, 120 Lab. Cas. ¶10,972, *cert. den.*, 112 S. Ct. 1951, 118 L.Ed.2d 555, 60 U.S.L.W. 3701, 60 U.S.L.W. 3775, 60 U.S.L.W. 3780, 140 L.R.R.M. (BNA) 2320, 121 Lab. Cas. ¶10,165 (1992). The issue of the propriety of any side agreement can be raised in a 301 action. See *Woodell v. International Brotherhood of Electrical*

Workers, Local 71, 112 S. Ct. 494, 116 L.Ed 2d 419, 60 U.S.L.W. 4024, 138 L.R.R.M. (BNA) 2881, 120 Lab. Cas. ¶11,010 (1992).

Thus without a vote on the effect of the release the collective bargaining agreement could not be modified to allow the Petitioners to avoid the effect of receiving severance pay.

Both the Eighth Circuit and the Trial Court reviewed carefully the Union Constitution and By-Laws and determined that votes are required to modify the collective bargaining agreement. Yet where was the vote modifying the contract allowing the Petitioners to avoid the effect of receiving severance pay?

It is absolutely essential for the Intervenors to enter the case to assert Doyle II and the severance pay argument when neither the Union nor the Company does such at any time. And where the damages assessable against the Union and the Company can be reduced by giving up jobs held by the Intervenors to the Petitioners thus cutting future damages, it does not take a mental giant to see that the Intervenors' rights could be sacrificed.

The majority of the bargaining unit could not afford to be a silent majority and let their rights under the contract be abrogated.

IV

ATTORNEY FEES ARE *NOT* CONSEQUENTIAL DAMAGES AND CAN ONLY BE AWARDED UNDER THE *AMERICAN RULE* UNDER VERY EXCEPTIONAL CIRCUMSTANCES NONE OF WHICH ARE PRESENT IN THIS CASE.

Let's face it, if the Union and the Company are jointly and severally liable for damages, and those damages include a healthy slug of attorney fees, then the members of the Union will pay, including the large number of Metz workers which includes the Intervenors. The Intervenors have a stake in the outcome of the attorney fees issue.

The essence of the Petitioners' argument on attorney fees is that they are part of the consequential damages and are literally mandatory. Thus the Eighth Circuit and the Trial Court are in error in failing to award attorney fees.

To date, no party has cited a key case that held that under 29 U.S.C. 187 attorney fees are not consequential damages. That case involved a lawsuit by an employer under Section 303 of the Labor Management Relations Act of 1947 as amended. Justice Marshall carefully analyzed the history of the labor act and the pertinent section and found the following:

(1) *In the absence of an express statutory declaration, attorney fees are not allowable of right.*

(2) *That, if there is no express statutory right, then the American Rule as stated in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 249-250, 95 S.Ct. 1612, 1617-1618, 44 L.Ed. 2d 141 (1975) applies.*

(3) *Then, only certain exceptional events will allow the assessment of attorney fees.*

See *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,* 102 S.Ct. 2112, 72 L.Ed. 2d 511, 110 L.R.R.M. (BNA) 2441, 94 Lab. Cas. ¶13,533 (1982).

It would be somewhat incongruous for attorney fees to be allowed automatically without statutory authority under Section 301 and yet not have them allowed to the employer under Section 303.

If one were to review the citations of *Alyeska* in the Courts, one would find that since 1975 more than 1,500 cases have relied upon the decision and its rationale. It would also seem incongruous to have a well established precedent overturned to allow mandatory attorney fees under Section 301 and yet bar mandatory attorney fees under 303 while both sections 301 and 303 are in the same Act. A unanimous Supreme Court in the *Summit Valley* case, could find no policy to make the word "damages" include attorney fees. The Supreme Court in the second to last paragraph of that case came right out and concluded that the damages do not include attorney fees. Similarly, "damages" under Section 301, should not automatically include attorney fees.

The Trial Court held and the Circuit Court approved the factual finding that attorney fees should not be allowed because none of the special circumstances were proven to exist. There has been no appeal of that factual determination. It is final and binding.

The major premise that Section 301 (29 U.S.C. 185) does **not** allow mandatory attorney fees as consequential

damages is supported by congressional intent demonstrated by the fact that when Congress wanted to legislate mandatory attorney fees for collection of delinquent contributions they had to enact a whole new law, 29 U.S.C. 1102(g)(2), also known as Section 502(g)(2) of ERISA. If Section 301 provided for mandatory attorney fees in the eyes of Congress then that Statute would not have to have been enacted, it would have only required mandatory pre-judgment interest and liquidated damages. For a discussion of the legislative history of Section 502(g)(2), see *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 108 S. Ct. 830, 98 L.Ed. 2d 936, 56 U.S.L.W. 4156, 127 L.R.R.M. (BNA) 2657, 108 Lab. Cas. ¶10,299, 9 Employee Benefits Cas. 1457 (1988). That case could also be cited for the proposition that Congress also felt that Section 301 did not provide for mandatory pre-judgment interest and thus had to enact a specific provision allowing same for fringe benefit contributions. Congress did not intend Section 301 to provide for either mandatory attorney fees or mandatory pre-judgment interest.

Mandatory attorney fees should not be granted. Further mandatory pre-judgment interest should not be granted either. The Circuit Court's findings that neither is appropriate should be upheld as appropriate factual findings not attacked on appeal.

CONCLUSION

The Petitioners should not be allowed to raise, at this late date, the issue of the standing of the Intervenors. That issue was resolved by the Circuit and the Trial Court and has not been properly and timely appealed.

The Intervenors have the right to argue the effect of Doyle II as severance pay eliminates both damages in this case and the right of the Petitioners to take jobs for which they have no seniority.

The Intervenors preserved their right to argue the effect of severance pay throughout this case. If there was a side agreement not to raise the issue by the Union, the Company, and the Petitioners, then the Intervenors are not bound by that Stipulation without a vote of the rank and file members entitled to vote on contractual modifications.

Lastly, attorney fees are not consequential damages to be awarded of right in a 301 case. Exceptional circumstances must be shown. There were none proven. The Petitioners did not appeal the Circuit's determination that there were none, so no attorney fees can be allowed. The same reasoning should apply for pre-judgment interest. Pre-judgment interest should likewise not be allowed.

Respectfully submitted,

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